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AMERICAN COURTS IN THE BICENTENNIAL DECADE AND BEYOND

Daniel J. Meador

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AMERICAN COURTS IN THE BICENTENNIAL DECADE AND BEYOND

*Daniel J. Meador**

I. Introduction

The American legal scene is the most complicated in the world. In this bicentennial decade of the United States the multiplicity of court systems and bodies of substantive law combine to give us a legal order of extraordinary complexity. Several other circumstances contribute to the complexity. One is the size and heterogeneous nature of the American population—now 230 million, composed of persons from every part of the world and thus from every religious and cultural background. Another circumstance is the sophisticated industrial-technological urban nature of American society. Another is the extraordinarily high volume of litigation. Still another is the immense geographical expanse of the nation. American courts and American law extend from the eastern coast of Maine, where Canada and the Atlantic ocean meet, westward across the continent and far into the Pacific to the Hawaiian Islands; they embrace the territory from Puerto Rico northwestward across Alaska beyond the Arctic Circle. The sun almost never sets on an American judge or legislator.[1]

I wish to focus on only two of the complicating circumstances referred to above: first, the multitude of semi-autonomous states, each with its own substantive law and judicial system; and second, the coexistence of a national judiciary functioning alongside each of the numerous state systems. After sketching some of the confusion derived from these two circum-

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*James Monroe Professor of Law, University of Virginia. This article is an edited version of the Matthews Lecture delivered by the author at the University of Mississippi Law Center on March 29, 1985.

[1] *See generally* The Role of Courts in American Society 28-71 (J. Lieberman ed. 1984)(picture of the extent and nature of American judicial activities in the 1980's).

stances, I offer suggestions concerning the need for a broad-gauged approach to nationwide reforms and various means for effectuating those reforms.

II. Multiple State Jurisdictions

When the American union came into being in 1789, the existence of thirteen separate states gave rise to relatively few legal complexities. Most transactions and events generating legal problems occurred within the bounds of a single state. Mobility and communication were limited. The fastest mode of travel was a horse. People and goods could be moved in bulk from one state to another only by wagon, stagecoach, or ship. Laws enacted by the legislature of Georgia, for example, and litigation in that state would have little or no impact on persons in New York or vice versa.

Now, nearly 200 years later, all has vastly changed. The thirteen states have grown to fifty plus two other jurisdictions—the District of Columbia and the Commonwealth of Puerto Rico. Each still has its own separate laws and its own court system. But, across this vast transcontinental and transoceanic domain, people, goods, and communications swirl daily and hourly. Almost any place in the nation can be reached within a few hours by air from any other place. Lunch in Washington and dinner in San Francisco on the same day are commonplace. A truck carrying tons of merchandise can traverse several states between dawn and dusk. Instantaneous communication throughout the country can be had by telephone, television, and radio. Out of this daily welter of trans-state activity arise controversies that we look to the legal system to resolve. But there is considerable uncertainty before litigation erupts as to which state's law will be applied and in which state the litigation will take place.

Consider this extreme yet realistic example: a commercial airliner carrying 200 passengers crashes; the passengers are residents of twenty different states. Suits are filed in some or all of those twenty states by the injured and the estates of those killed. What law is to govern liability and the measure of damages, and which of these states has jurisdiction to adjudicate? It could be that the courts of all twenty states have jurisdiction,

and it is possible that each could apply its own legal rules.[2] Today states are permitted to exercise territorial jurisdiction over outsiders and to apply their own law where there is only the thinnest connection with the defendants or the subject matter. That circumstance, combined with the fluidity of American life and the large number of jurisdictions, makes it difficult for one to know in advance where he might be sued or what substantive law will govern a particular event.

The case may have equally troubling ramifications when the court is not to apply the law of the state where it sits. The interstate fluidity of transactions means that state courts are often faced with having to apply the law of another state. Thus at one time or another the courts of a particular state may be required to look to the law of any of the forty-nine other states—as well as of foreign countries—in order to decide a contract or tort case. The substantive law picture is even more complicated, however, because in addition to all of the states' laws there is a substantial body of federal law which must often be applied in state court litigation, a point discussed more fully below.

III. Federal Trial Courts and Overlapping State-Federal Jurisdictions

In the center of the town of Oxford stands the courthouse, the seat of the circuit and chancery courts for Lafayette County, established under the laws of the state of Mississippi. Only two blocks away is another building housing the United States District Court for the Northern District of Mississippi. It is likewise a trial court. That court sits there today because of two decisions made nearly two centuries ago.

The first decision was made in Independence Hall in Philadelphia during the summer of 1787. As a compromise, the delegates writing the United States Constitution provided in Article III that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Con-

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[2] For a discussion of the facts and litigation patterns involving several possible forums in which to sue, see Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238-61 (1981). *See also In re* Paris Air Crash, 399 F. Supp. 732, 738 (C.D. Cal. 1975); *In re* Air Crash Disaster at Tweed-New Haven Airport, 343 F. Supp. 951, 952 (J.P.M.L. 1972).

gress may from time to time ordain and establish."[3] Thus, as far as the Constitution itself is concerned, the federal judiciary might consist solely of the Supreme Court, leaving all other judicial business to the courts of the states. But two years later—in the second historic decision—Congress exercised its option to create more federal courts.[4] The Judiciary Act of 1789 established the United States District Courts, one to be located in each state.[5] As new states entered the Union, each with its own set of trial courts, a federal district court was also promptly established.[6] Thus we have today throughout the nation a side by side set of trial forums—one state and one federal.

This arrangement is unique among the federalisms of the world. In Canada, Australia, and the Federal Republic of Germany, for example, all trial courts (with small exceptions) are state courts; the federal courts are appellate courts.[7] In other words, in those countries there is no dual judicial system; at any level—trial or appellate—there is a single forum for the handling of any case.

A visitor from another land arriving in the United States and seeing two separate trial courts sitting side by side, organized under separate governmental authority, might reasonably assume that the federal district courts sit to entertain only cases arising under federal law and that the state trial courts sit to entertain only cases arising under state law. Indeed there would be little problem if that were in fact the situation. But it is not. The state trial courts sitting in the county courthouse decide cases under both state and federal law. The federal district court, only a short distance away, likewise decides cases under

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[3] U.S. CONST. art. III, § 1.

[4] Judiciary Act of 1789, ch. 20, 1 Stat. 73.

[5] *Id.* As states became more populated, legislation was enacted to create more than one district in some. *See, e.g.,* Act of April 20, 1818, ch. 108, 3 Stat. 462 (1818)(Pennsylvania divided into 2 districts).

[6] *E.g.,* Act of April 21, 1820 ch. 47, 3 Stat. 564, § 2 (1820)(Act establishing district court in state of Alabama); Act of April 3, 1818 ch. 29, 3 Stat. § 2 (1818) (Act provided for Mississippi to be a judicial district with a district court).

[7] *See* 5 THE ENCYCLOPEDIA AMERICANA 390 (int'l. ed. 1975)(general discussion of Canada's judicial system); 2 THE ENCYCLOPEDIA AMERICANA 759 (int'l. ed. 1975)(general overview of Australia's judicial system); 12 THE ENCYCLOPEDIA AMERICANA 624 (int'l. ed. 1975)(general discussion of judicial system of the Federal Republic of Germany).

both state and federal law. There is a substantial overlap in the types of questions adjudicated and in the law being applied.

The outpouring of Congressional enactments over the years has created a large and varied array of federal interests, rights, and liabilities that can easily arise in state court litigation. Unless Congress has expressly excluded the state courts from entertaining federally based claims, state courts of general trial jurisdiction are open to hear such cases.[8] Indeed, with only narrow exceptions, state trial courts *must* do so.[9] Federal law can also be drawn into the case from the defendant side, as a federal statute or constitutional provision might provide a defense or immunity to a state-created cause of action.

On the criminal side, state trial court involvement with federal law is even more extensive. Decisions of the United States Supreme Court interpreting the fourteenth amendment have spawned what is, in effect, a federal code of criminal procedure for the state courts. Federal law is now involved in every step of the process from investigation through arrest, indictment, preliminary proceedings, trial, sentencing, and appeal.

A recent study revealed the extent to which federal law now permeates state court adjudication.[10] This study examined the decisions of the supreme courts of four states—California, Illinois, Connecticut, and Virginia—rendered during the years 1959 and 1979 to determine the percentages of those decisions that involved federal law. In 1959 the overall proportion of cases in the four states involving federal law was 21%; in 1979 that figure was 42%—a doubling in two decades. Considering criminal cases alone, the 1979 figure was 79%. These percentages include opinions in which federal law was merely cited as well as those

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[8] Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962); *see* THE FEDERALIST No. 82 at 536 (A. Hamilton)(E. Earle ed. 1941)(state courts have concurrent jurisdiction in cases involving a federal question unless prohibited by federal law).

[9] Testa v. Katt, 330 U.S. 386, 391 (1947); *see* Chaflin v. Houseman, 93 U.S. 130, 137 (1876)(state courts have authority and duty to enforce federal laws). *See generally* Gordon & Gross, *Justiciability of Federal Claims in State Courts*, 59 NOTRE DAME L. REV. 1145, 1156-77 (1984).

[10] *See Legislation for the Improvement of the Judiciary: Hearing Before the Subcomm. on Courts of the Comm. on the Judiciary, United States Senate*, 97th Cong., 2d Sess. 293 (1982)(analysis of 1400 state supreme court decisions in 4 states to determine whether influence of federal law on decisions substantially increased from 1959 to 1979).

in which federal questions were actually decided.

Recently I conducted a survey of federal questions decided in other state supreme courts during the year 1983.[11] During that year, for example, the Supreme Court of Mississippi decided questions of federal law in forty-six of its opinions, approximately 17% of the year's total. Federal law was cited, although not the subject of a square decision, in many other opinions. The proportion of federal law business was even higher in some of the other states surveyed. In Arizona, for example, federal questions were decided in 37% of the state supreme court's opinions.

Whatever the exact percentage, it is clear that federal law now forms a large part of state judicial business. Where these federal law decisions are controlling in the case, the way is open for the United States Supreme Court to review the state court judgment. Moreover, in criminal cases the presence of federal questions opens the way for possible further proceedings in the federal district court on habeas corpus.[12] Thus the increase in the role of federal law in state court litigation means not only that state courts are more frequently looking to federal law, but also that increasing numbers of state court decisions are subject to federal judicial review, either in the Supreme Court or in the federal district courts.

Because of the habeas corpus jurisdiction, the federal district courts have a substantial measure of state criminal business. Although a federal district court is limited to deciding the federal questions in the case, the basic subject matter is a state prosecution for crime. The result of this jurisdiction is that a single state criminal prosecution may be dealt with in both state and federal courts at the trial level as well as at the appellate level.

The greatest source of state law business in the federal district courts results from the diversity of citizenship jurisdic-

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[11] The statistics in this paragraph are drawn from a study still in progress. The figures are tentative and are subject to revision. The results of the study will be published at a later date. The states surveyed are Arizona, Colorado, Georgia, Minnesota, Mississippi, New Jersey, and Ohio.

[12] 28 U.S.C. § 2241 (1982)(power to grant writ of habeas corpus); 28 U.S.C. § 2254 (1982)(remedies available in federal court for person in state custody).

tion.[13] Here we have one of the most dramatic illustrations of overlapping and duplicative state-federal judicial authority. Consider this situation: Two residents of Oxford, *A* and *B*, are struck by tractor-trailer trucks on the same day on the same highway near Oxford. These vehicles are identical and are hauling similar goods; each is on a trip from Memphis to Jackson. The vehicle that strikes *A* is owned and operated by a company in Memphis, chartered under Tennessee law. The vehicle that strikes *B* is owned and operated by a company in Jackson, chartered under Mississippi law. In all other respects the two cases are indistinguishable. Because *A* and the Memphis company are "citizens of different states,"[14] *A* has a choice of forum in which to sue the company for his injuries. He may sue in the state circuit court or he may sue in the federal district court two blocks away. However, *B* may sue only in the state circuit court because he and the Jackson company are both considered Mississippi citizens.

The choice of trial forum will also result in a different forum for appellate review. If *B*, having no option, sues in the state trial court, the appeal will go to the Supreme Court of Mississippi, sitting in Jackson, and there the case will terminate with a definitive decision on the governing state law. If *A* exercises his option to sue in the federal district court, the appeal will go to the United States Court of Appeals for the Fifth Circuit, sitting in New Orleans, and there will be at least a possibility of further review in the United States Supreme Court.[15] In deciding this case the Court of Appeals, like all federal courts, must apply the law of the state,[16] but, unlike the Supreme Court of Mississippi, it cannot give a definitive interpretation of that state law. If the Court of Appeals mistakenly reads state law, there is no way to correct it on review by the authoritative expositor of that law—the state supreme court.[17] On the other

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[13] 28 U.S.C. § 1332(a)(1982).

[14] *Id.*

[15] 28 U.S.C. §§ 1254, 1291 (1982).

[16] Erie R.R. v. Tompkins, 304 U.S. 64, 65 (1938).

[17] While litigation is pending, Mississippi law permits, but does not require, the United States Court of Appeals to certify to the state supreme court a question of state law for authoritative resolution by the state court. MISS. SUP. CT. R. 46.

hand, if a state supreme court mistakenly reads federal law, that reading can be corrected by review in the United States Supreme Court.[18]

This state law business in the federal district courts is not insignificant. Diversity of citizenship cases account for approximately one quarter of all civil filings in the federal district courts nationwide. But the demands they make on federal judicial resources are even more substantial. Diversity cases are settled less frequently than others, and they account for 60% of all civil trials in the federal district courts.[19]

This complex American legal system, with its multiple states and duplicative state-federal judicial authority, affords litigants a multidimensional set of choices relating to both substantive law and forum. Consider one more illustration: A commercial transaction takes place among persons located in Pennsylvania, Ohio, and Indiana. In a controversy stemming from the dealings across these three states, it is likely that a suit by the complaining party could be brought in any one of the three. Assuming, not unrealistically, that there is diverse citizenship between the opposing parties, there would be, in addition to a choice of state trial court in each state, a choice of a federal district court in that state. Thus there are six possible trial forums—three state and three federal. Unless federal law controls the parties' rights and liabilities, there is also the possibility that a different substantive rule will be applied in each of the three states; in that event, a party's choice of location of suit means also a choice of governing law.

Even if federal law governs and suit is brought in a federal district court, the outcome may differ depending on the state in which suit is filed. If suit is filed in the federal district court in Pennsylvania, an appeal will go to the United States Court of Appeals for the Third Circuit; in Ohio the appeal will go to the Sixth Circuit; in Indiana the appeal will go to the Seventh Circuit. Because federal appellate courts are not bound to follow

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[18] 28 U.S.C. § 1257 (1982).

[19] *Diversity of Citizenship Jurisdiction—1982: Hearings on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 97 (1982).

the decisions of each other, it is possible that three different interpretations of federal law could be applied in these three circuits. Such varying interpretations of federal law may go uncorrected for years because the Supreme Court's overburdened docket prevents it from promptly ironing out all intercircuit conflicts. The evil bedeviling the American legal system before *Erie R.R. v. Tompkins*[20] is again stalking the land: a choice of forum, in many circumstances, results in the application of a different substantive rule so that persons cannot know what law will govern their primary private activity until litigation occurs. The evil may be present whether state law applies or federal law applies.

If all of this sounds muddled, it is. The realities are even more confusing; there are many other complications that I have not mentioned. I have attempted to sketch a broad outline of the American legal scene to suggest its multistate, interstate, and state-federal complexities, both substantively and procedurally. I submit that no rational legal architect would have sat at his drawing board and designed this American legal system. It has not come about through careful, one-time planning. Rather, it has evolved after nearly two hundred years of changes in the nature of American society, decisions of the United States Supreme Court, and Acts of Congress.

Although we lack empirical data, we can safely conclude that this complicated, multifaceted system is costly in a variety of ways. One of the significant elements of expense is the time invested by lawyers in legal research to determine the appropriate forum and the applicable law. Another element of cost is the judicial time required to hear and resolve uncertain and disputed questions relating to jurisdiction and choice of law. Both lawyer research time and judicial decision time mean added delay and added expense to litigants and to taxpayers. The opinions generated by the courts in resolving such questions add to the volume of reported decisions that must be purchased, housed, and maintained by hundreds of law libraries. The time and expense extracted by the system is reflected in the typical American law school curriculum. The complications of the sys-

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[20] 304 U.S. 64 (1938).

tem infuse numerous courses, but dominate in three: the basic first-year course in civil procedure and the upper-class courses in federal courts and conflict of laws. The total number of casebook pages and class hours devoted to these distinctively American complications could probably be reduced by more than half if the system were designed otherwise.

IV. Possibilities For Rationalization and Simplification

Despite much criticism of the courts over the years there is a widespread and deeply rooted American belief that law and effectively functioning courts are essential to the stability and well-being of the United States. Democratic government and a large degree of individual liberty may well be dependent upon the vitality of the judiciary. If we hold these views, there is cause for concern in the contemporary situation. It is believable that a legal order can break down under the pressure of mounting complications, unpredictability, expense, and delay. It is useful to recall Lord Macaulay's statement that it is necessary to reform in order to preserve.[21] He made that statement at a time when English courts were in a plight similar to that of American courts today. In England then there were three different law courts with overlapping jurisdictions alongside a separate equity court. That irrational and confusing collection of forums and procedures was eliminated in 1875 when Parliament created a simplified and unified judicial structure.[22]

We need to think now about the American system in equally creative and bold ways. We begin with certain political and institutional realities that are unlikely to be altered in our time. One is the existence of the fifty states constituting the American Union. The other is the existence of federal trial courts sitting alongside the state court systems. Because of these circumstances it is not possible to eliminate all of our legal complexities. It is possible, however, to ameliorate them by simplifying and coordinating the substantive law and the multiple

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[21] "Reform, that you may preserve." *Debate on the First Reform Bill*, March 2, 1831, 2 Parl. Deb. (3d ser.) 1159, 1204 (1831).

[22] Supreme Court of Judicature Act, 1873, 36 & 37 Vict., ch. 66, *as amended by* Supreme Court of Judicature Act, 1875, 38 & 39 Vict., ch. 77.

jurisdictions.

To accomplish this, imaginative legal architects must put their minds on these systemic problems. We need to look with a wide-angle lens at our multiple judiciaries nationwide. Patchwork changes will not do. Here I suggest several approaches to the kinds of broad-scale reforms that we must devise. These are intended to be illustrative of the lines along which we should think; the list is by no means comprehensive.

Federalizing governing legal rules. The objective here is to reduce the complexity stemming from the fifty sources of state laws by Congressional enactment of a single nationwide rule in certain situations, thereby avoiding the unpredictable variations in the law governing liability and damages. Although Congressional authority under the Commerce Clause is far-reaching, it has been exercised rather sparingly to federalize private rights and liabilities. This is a useful option, however, where there is special reason to eliminate varying outcomes and to reduce artificial incentives for forum shopping as in mass tort and product liability cases. But if such federalizing of governing rules is to achieve the desired objective, we must at the same time redesign the federal appellate structure to enhance its capacity to maintain nationwide uniformity, another line of reform suggested below.

Reducing duplicative state-federal jurisdiction. Here the objective is to make available, to the extent feasible, only one type of forum—either state or federal, but not both—for any category of case. This objective cannot be achieved perfectly because many cases have mixed state and federal elements. However, steps can be taken to reduce the amount of dysfunctional, overlapping jurisdiction.

The most obvious approach from the federal side is to reduce or eliminate the general diversity of citizenship jurisdiction. This step has been urged periodically throughout American history, and it has been pressed vigorously since 1977. Numerous hearings on such proposals have been held in both houses of Congress,[23] and in 1978 the House of Representatives passed a

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[23] *See, e.g., Diversity of Citizenship Jurisdiction—1982: Hearings on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of*

bill to eliminate the general diversity jurisdiction.[24] Using this jurisdiction as in the interpleader statute,[25] to provide a forum for the litigation of multiparty disputes that cannot be litigated in any one state court, has functional justification.[26] But this jurisdiction, in its present configuration, does not embrace such multiparty possibilities. At the same time, the existing authority includes a vast array of state law cases for which federal district court jurisdiction makes little sense.

In criminal matters, federal habeas corpus jurisdiction can be substantially reduced. There has been a trend in this direction in Supreme Court decisions of recent years,[27] and a proposal that would go farther in that direction is pending in Congress.[28] This step would concentrate federal judicial review of state criminal cases in the appellate courts, eliminating almost all federal trial court involvement.

With the objective of providing only one trial forum—either state or federal—for most cases, Congress could, even in federally created rights of action, foreclose the filing of suits in the federal district courts, leaving the state trial courts as the forums for such actions.[29] If this were done, however, adequate

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the House Comm. on the Judiciary, 97th Cong., 2d Sess. (1982); *Jurisdictional Amendments Act of 1979: Hearings on S. 679 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 and 2202 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); *Federal Diversity of Citizenship Jurisdiction: Hearings on S.2094, S.2389 and H.R. 9622 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978); *Diversity of Citizenship Jurisdiction/Magistrate Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

[24] *See* H.R. 9622, 95th Cong., 2d Sess., 124 CONG. REC. 5008 (1978)(House of Representatives vote on bill to abolish diversity of citizenship jurisdiction in federal courts: yeas 266, nays 133, not voting 35).

[25] *See* 28 U.S.C. §§ 1335, 1397, 2361 (1982).

[26] Proposals to this effect were recommended in 1968 by the American Law Institute. *See* A STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, A.L.I. §§ 2371-2374, 2376 (1969).

[27] *See* Engel v. Isaac, 456 U.S. 107, 125 (1982); Rose v. Lundy, 455 U.S. 509 (1982); Wainwright v. Sykes, 433 U.S. 72, 91 (1977); Stone v. Powell, 428 U.S. 465, 494 (1976).

[28] H.R. 1127, 99th Cong., 1st Sess. (1985); H.R. 1204, 99th Cong., 1st Sess. (1985).

[29] *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 313-15 (2d ed. 1973)[hereinafter cited as

provisions for federal appellate review of federal questions would need to be made; otherwise nonuniformity in the application of federal statutes would almost surely result throughout the country. There is no inconsistency in Congressional creation of a right of action under federal law and in the use of state courts as the sole forums for the assertion of such rights. Numerous federally created causes of action are essentially state court types of matters, such as FELA[30] (common law negligence actions draped in federal statutory language), Truth-in-Lending actions[31] (misrepresentations cast in federal statutory language), and other federal regulatory measures that do not draw into question large national interest. On the other hand, Congress can exclude state courts from deciding specified federal cases, leaving such cases entirely to the federal district courts.[32] This, too, would eliminate duplicative jurisdictions. The point is that Congress can route federal cases at the trial level either to the state courts or to the federal courts and thereby avoid a dysfunctional overlap.

Meshing the state and federal judiciaries. The awkward and inefficient linking of the state courts to the federal courts is best seen in the criminal field. There is no orderly progression of criminal cases from the state supreme courts to the federal district courts. Federal habeas corpus requires that a convicted prisoner initiate a new civil action in a federal district court;[33] such a proceeding is considered a fresh lawsuit and can be brought without limit of time. Moreover, it is odd to have a judicial structure in which decisions of appellate courts are reviewed by trial courts. The objective should be to provide for a review process through which state criminal cases (at the instance of convicted defendants) can flow promptly to a federal appellate forum for review of the federal questions.

The solution seems to lie in one of two directions: the vesting of jurisdiction in the United States Courts of Appeals to review decisions of the state supreme courts within their circuits,

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HART & WECHSLER].

[30] 45 U.S.C. §§ 51-60 (1982).

[31] 15 U.S.C. §§ 1602-1693r (1982).

[32] *See* HART & WECHSLER, *supra* note 29, at 418-20.

[33] 28 U.S.C. §§ 2242-2254 (1982).

or the creation of new federal appellate tribunals with nationwide jurisdiction over state supreme court decisions involving federal questions. The possibility of using federal tribunals below the Supreme Court to review state judgments on federal matters was suggested in *The Federalist*,[34] and there is clearly no constitutional barrier to this arrangement. Reform along these lines is closely related to broader reforms among the federal appellate courts, the theme to be discussed next.

Redesigning the federal appellate structure. The federal appellate structure presently lacks adequate capacity in two respects. One is quantitative—a lack of capacity to decide within a reasonable time the number of appeals, federal and state, being pressed upon the system. The other is a lack of sufficient capacity to monitor the application of federal law in state and lower federal courts so as to maintain nationwide uniformity in the administration of federal justice. The objective, therefore, must be to redesign the appellate aspects of the federal judiciary so as to provide an increased capacity in both respects.

Over the last fifteen years numerous suggestions aimed at these twin objectives have been put forward in Congress, among the bench and bar, and in legal literature. They can be grouped into four categories:

1. A new appellate body to which the Supreme Court can refer cases for resolution.[35] Such a forum would be, in effect, an overflow chamber for the Supreme Court, thereby enlarging the capacity of the federal judiciary to render definitive decisions having nationwide precedential value. Such a forum has been referred to variously as a National Court of Appeals, Intercircuit Tribunal, and, most recently, Intercircuit Panel.[36]

2. New intermediate appellate courts with nationwide jurisdiction over district court judgments in certain types of cases.

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[34] *See* THE FEDERALIST No. 82 at 516 (A. Hamilton)(E. Earle ed. 1941).

[35] This idea has been under discussion since the early 1970's. The most recent and comprehensive collection of material on the subject is contained in *Supreme Court Workload: Hearings on H.R. 1968 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. (1983).

[36] This latter title was first suggested by Chief Justice Burger in *The Time is Now for an Intercircuit Panel*, 71 A.B.A.J. 86 (Apr. 1985).

There are presently two models. One is the Temporary Emergency Court of Appeals which has jurisdiction nationwide to review district court decisions in cases arising under the energy laws.[37] The other is the relatively new United States Court of Appeals for the Federal Circuit which has appellate jurisdiction over all district court judgments in cases arising under the patent laws.[38]

3. Granting appellate jurisdiction over state court decisions to federal appellate courts other than the Supreme Court. As suggested above, this could be arranged either by assigning such jurisdiction to the existing United States Courts of Appeals or by creating one or more new federal appellate courts.[39]

4. Increasing the number of judges on the existing regional United States Courts of Appeals but requiring those courts to be organized internally into subject matter panels (although not into narrowly specialized groups).[40] A subject matter style of organization would eliminate problems of intracircuit conflicts, increase predictability in the law, and remove artificial incentives to appeal that now exist because of uncertainty as to the composition of the appellate panel that will hear any given case.

Although arguments can be made for and against each of these proposals, any one of them would enhance the federal appellate capacity and thus assist in achieving the desired objectives.

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[37] The current version of the Temporary Emergency Court of Appeals was established pursuant to the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743 (codified at 12 U.S.C. § 1904 notes (1982)). *See generally* Comment, *The Appellate Jurisdiction of the Temporary Emergency Court of Appeals*, 64 MINN. L. REV. 1247-73 (1980).

[38] *See* 28 U.S.C. § 1295(a)(4)(C) (1982). The Court of Appeals for the Federal Circuit was created pursuant to the Federal Courts Improvement Act of 1982 (F.C.I. Act), Pub. L. No. 97-164, 1982 U.S. CODE & CONG. AD. NEWS (96 Stat.) 25. *See generally* Comment, *An Appraisal of the Court of Appeals for the Federal Circuit*, 57 S. CAL. L. REV. 301, 305-24 (1984).

[39] *See generally* Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273-280 (1983); Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 1981 B.Y.U.L. REV. 545, 561 (1981); Haynesworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 604-15 (1974).

[40] For a detailed explanation see Meador, *An Appellate Court Dilemma and a Solution through Subject Matter Organization*, 16 U. MICH. J.L. REF. 467, 475-85 (1983).

V. Ways and Means—Beyond the Bicentennial Decade

Ideas along these lines, as well as many others, need refinement in light of the best data we can obtain and the best thinking we can bring to bear. To be translated into actual reforms, ideas must be both sound and politically acceptable. In the United States we lack an effective mechanism for the development of good ideas concerning legal and judicial improvements and for bringing about their implementation. In England the Office of the Lord Chancellor performs this function. In the countries of Western Europe, the Ministries of Justice are charged with this responsibility. The absence of a fetish about the separation of powers in those countries permits those government agencies to span the judicial, legislative, and executive apparatus and to bring to bear on court problems the full resources of the government. While we cannot precisely duplicate those offices, we can do much more to harness the collective resources of our three branches in order to get them to pull together in the interest of improving the administration of justice.

The systemic reforms needed in the federal judiciary and in relation to the state-federal interplay can only be brought about by Congressional enactments. Yet Congress is seriously handicapped in addressing judicial problems. The constant press of urgent national business and the concerns of constituents push court business down to a low priority.[41] No large, politically influential groups are pressing for court reform. There have been no marches on Washington with irate citizens carrying placards saying, for example, "Diversity Jurisdiction Must Go." To overcome these practical difficulties, and to provide Congress with necessary data and ideas, the other two branches of government must be brought into the process in a more effective way.

In the executive branch the Department of Justice must bear this responsibility. There is historical precedent for such a Justice Department role. When the federal judiciary was less than two years old, the House of Representatives asked the first Attorney General, Edmund Randolph, to examine the courts to

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[41] *See generally* Easterbrook, *What's Wrong With Congress?*, 254 Atl., Dec. 1984, at 57, 58-79.

determine how they were functioning. In response to that request, Randolph submitted a report proposing remedial legislation.[42] Sporadically over the years attorneys general and the Department of Justice have taken note of judicial problems and proposed statutory changes. This departmental work, however, has been uneven and has depended largely on the interests of the person holding the office of Attorney General. Although the work has become somewhat more institutionalized since the 1960's, it is still irregular. What is needed for the future is an office in the Department of Justice charged with being continually alert to problems of the judicial system and with developing proposed solutions for those problems.[43] In this work the Department can perform somewhat like a Ministry of Justice in a Western European country.[44]

The judiciary itself can do more by way of assisting in the development of remedial legislation for judicial problems. Specifically, the research activities of the Federal Judicial Center can be broadened to address aspects of the system that require curative legislation. The Federal Judicial Center's research has been primarily aimed at problems that judges themselves can correct. This is a valuable resource that should be enlarged to provide more assistance to Congress in developing appropriate statutory enactments.

In addition to enlarging its research activities the judicial branch needs a new high-level officer who can coordinate research and long-range planning among the Federal Judicial Center, the Administrative Office of the United States Courts, and the committees of the Judicial Conference of the United States. At present there is no single judicial officer, other than the Chief Justice, vested with system-wide responsibility. But the office of Chief Justice has become badly overburdened. The Chief Justice is one of nine members of the Supreme Court, and he has all of the adjudicative work that each of the Associate Justices has. In addition, he is the presiding judge and chief ad-

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[42] *See* Report by Edmund Randolph to House of Representatives, 1 AM. ST. PAPERS MISC. No. 17, Dec. 31, 1790, at 21.

[43] *See* Meador, *Role of the Justice Department in Maintaining an Effective Judiciary*, 462 ANNALS 136, 146-51 (July 1982).

[44] *Id.* at 146.

ministrative officer of the Supreme Court. Furthermore, he must serve as chief administrator and manager for the entire nationwide federal judiciary. A new officer, who would best be an Article III judge designated by the Chief Justice for this assignment, could relieve the Chief Justice of his system-wide managerial responsibilities and could also provide the planning capability that is now lacking in the judiciary. Such an officer could lend significant assistance to the Judiciary Committees of the House and Senate by providing data and by recommending solutions for the judicial difficulties.[45]

But even with the Justice Department being regularly attentive to the functioning of the judiciary and a new Third-Branch planner-administrator, we would still lack an effective mechanism for melding together research results, assorted ideas and proposals, and the views of the three branches and various interest groups. The Justice Department's work would tend to reflect the perspective of the executive branch, and the judiciary's work would tend to reflect the judges' perspective. In other words, there would still be no high-level policy and planning body capable of marshalling resources from the public and from across the three branches.

A suggestion to rectify the situation was made by Chief Justice Burger not long after he took office, when he urged the creation of a three-branch council to exchange views and ideas concerning court problems.[46] In a report published in January, 1977, a Department of Justice committee on the needs of the federal courts made a similar suggestion.[47] Thereafter, the Department's newly created Office for Improvements in the Administration of Justice sought to establish such a body, but representatives of the three branches were unable to agree on its formal structure.

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[45] *See* Fish, *The Office of Chief Justice of the United States: Into the Federal Judiciary's Bicentennial Decade*, in THE OFFICE OF CHIEF JUSTICE 1-153 (White Burkett Miller Center of Public Affairs, Univ. of Va. 1984); Meador, *The Federal Judiciary and Its Future Administration*, 65 VA. L. REV. 1031, 1047-54 (1979).

[46] *See* Address by Warren E. Burger, American Bar Association Annual Meeting, *The State of the Federal Judiciary—1970* (Aug. 10, 1970), *reprinted in* 56 A.B.A.J. 929, 933 (1970).

[47] *See* DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS 16-17 (1977).

As an outgrowth of that effort, however, the Brookings Institution, in cooperation with the three branches, began in 1978 to host an interbranch seminar on the administration of justice at Wiliamsburg, Virginia.[48] That group met annually for six consecutive years, skipped a year, and met again in 1985. These gatherings have demonstrated the value of a three-branch exchange of information and ideas. They have probably contributed to the passage of several important pieces of legislation aimed at strengthening the courts.

Since the early 1980's, proposals have been made for the establishment by Congress of a more official three-branch body.[49] The latest version of that proposal is currently pending in the Senate.[50] That bill would create a fourteen-member commission consisting of two Senators, two Representatives, four persons appointed by the Chief Justice, four persons appointed by the President, and two persons designated by the Conference of Chief Justices (the organization of the state chief justices). The commission would be charged with studying all aspects of American courts, state and federal, and with developing long-range plans embodying the alterations in jurisdiction and structure that the commission deems useful to provide for an effective system of justice.

Whatever one thinks about a commission of this sort, the point is that we need to establish an entity responsible for developing broad-scale, nationwide measures to keep the structure, jurisdiction, and procedure of the court systems constantly in tune with the circumstances of the times. Such an entity must span the three branches of the federal government and the federal-state divide. It must be provided with a constant flow of information and ideas concerning the functioning of the multiple court systems of the nation, and it must develop judicial designs

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[48] *See* Cannon & Cikins, *Interbranch Cooperation in Improving the Administration Of Justice: A Major Innovation*, 38 WASH. & LEE L. REV. 1-2 (1981); Cannon, *The Spawning Ground for Better Federal Courts*, 69 A.B.A. J. 1719-20 (1983).

[49] *See* Wallace, *Working Paper—Future of the Judiciary*, 94 F.R.D. 225-26, 235-36 (1982); Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 445-47 (1983); Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617, 625-37.

[50] S.601, 99th Cong., 1st Sess. (1985).

and innovations at least equal in creativity to those of 1787 in Philadelphia and 1875 in Westminster. Above all, this body must be ever mindful of Macaulay's proposition that reformation is necessary for preservation.

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1984 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

Decisions by the Mississippi Supreme Court in 1984 in the area of administrative law encompassed subjects involving worker's compensation,[1] municipalities and counties,[2] the state bar and judicial perform-

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[1] Southern Farm Bureau Casualty Ins. Co. v. Holland, 469 So. 2d 55, 59 (Miss. 1984)(civil action against compensation carrier for independent intentional tort not barred by exclusivity provision of Workers' Compensation Act); Townsend v. Dyer Woodturnings, Inc., 459 So. 2d 300, 301-02 (Miss. 1984)(to perfect an appeal from compensation commission, notice must be filed with Secretary of Commission within 30 days of Commission's order); Flake v. Randle Reed Trucking Co., 458 So. 2d 223, 224-25 (Miss. 1984)(Commission's interpretation of facts should be affirmed unless manifestly in error; Commission's determination that disability was to whole hand rather than to two fingers not manifestly wrong); Strickland v. M.H. McMath Gin, Inc., 457 So. 2d 925, 929-31 (Miss. 1984)(insignificant discrepancies between conflicting evidence and unopposed hypothetical do not render expert's conclusion based on hypothetical inadmissible; employee entitled to recover up to $100.00 under MISS. CODE ANN. § 71-3-15(5)(1972) for medical expenses incurred even outside state); Burham v. Klumb Forest Prod. Center, Inc., 453 So. 2d 1300, 1303 (Miss. 1984)(Commission manifestly wrong in finding employee's disability entirely due to preexisting coronary artery disease); Litton Systems, Inc. v. Enochs, 449 So. 2d 1213, 1215 (Miss. 1984)(Compensation Act does not bar employee's action against employer for injuries sustained while leaving work and determined to be non-compensable in compensation hearing since injury did not arise within scope of employment); Evans v. Marko Planning, Inc., 447 So. 2d 130, 132 (Miss. 1984)(although "coming and going" rule was misapplied, substantial evidence supported Commission's order that employee's death on way to job site to pick up paycheck was outside course of employment); Burgess v. Halter Marine, Inc., 445 So. 2d 1385, 1386 (Miss. 1984)(en banc)(Longshoremen's and Harbor Workers' Compensation Act does not bar injured employee who received compensation benefits from suing ship owner for negligence, even if owner is his employer); Miller v. McRae's, Inc., 444 So. 2d 368, 371-72 (Miss. 1984)(false imprisonment claim against employer not barred by exclusivity provision of compensation act).

[2] White v. City of Tupelo, 462 So. 2d 707, 709-10 (Miss. 1984)(disposal of fire department equipment is governmental function granting immunity to city; city fire chief not engaged in ministerial duty and thus immune from suit); City of Jackson v. Ainsworth, 462 So. 2d 325, 328-30 (Miss. 1984)(judgment of additure was reasonable to compensate plaintiff for permanent impairment); Western Line Consol. School Dist. v. City of Greenville, No. 55,337, slip op. at 3-4 (Miss. Dec. 19, 1984)(determination of reasonableness of municipal annexation is judicial, not ministerial, function; new hearing granted when chancellor viewed his role as ministerial), *original opinion withdrawn*, 465 So. 2d 1057, 1058 (Miss. 1985); Pearl River County Bd. of Supervisors v. South East Collections Agency, Inc., 459 So. 2d 785, 786-87 (Miss. 1984)(to collect hospitalization

ance,[3] public welfare departments,[4] utilities and resources,[5] and various

costs for county prisoner, proper procedure is to allege cause of action under MISS. CODE ANN. § 47-1-59 (1972) rather than sue on promissory note); City of Mound Bayou v. Roy Collins Constr. Co., 457 So. 2d 337, 341-43 (Miss. 1984)(neither state nor its political subdivisions are required by Rule 48 of Mississippi Supreme Court Rules to prepay court costs; MISS. CODE ANN. § 9-13-33 (Supp. 1983) superseded by Rule 48, thus filing of designation of record on appeal not required to perfect appeal); Covington County v. Page, 456 So. 2d 739, 741-42 (Miss. 1984)(doctrine of equitable estoppel may be applied against county when county had ignored whatever title to property it may have had by collecting ad valorem taxes and signing quitclaim deed); Knebel v. City of Biloxi, 453 So. 2d 1037, 1040-41 (Miss. 1984)(city can require municipal police officer to submit to polygraph test concerning involvement in illegal drugs under investigation or be dismissed; statement, or fruits thereof, elicited from employee upon threat of loss of employment is inadmissible in criminal proceeding but does not render employee immune from prosecution); *In re* Enlargement of the Boundaries of Yazoo City v. City of Yazoo City, 452 So. 2d 847, 842-43 (Miss. 1984)(chancellor not manifestly in error concerning city addition; annexation not adopted for racially discriminatory purpose); *In re* Extension of the Boundaries of the City of Clinton, 450 So. 2d 85, 89 (Miss. 1984)(ordinance and judicial approval expanding city limits met criteria for municipal expansion as established by Dodd v. City of Jackson, 238 Miss. 372, 118 So. 2d 319 (1960)); Cutchens v. Bryant, 449 So. 2d 231, 232 (Miss. 1984)(city council decision on petition for rezoning should be based on evidentiary hearing pursuant to MISS. CODE ANN. § 17-1-17 (Supp. 1983)); Grenada Mun. Separate School Dist. v. Jesco, Inc., 449 So. 2d 226, 227-28 (Miss. 1984)(school district, as subdivision of state, had legal authority to sue for breach of contract for construction of school buildings); Board of Supervisors of Lamar County v. Hattiesburg Coca-Cola Bottling Co., 448 So. 2d 917, 920-22 (Miss. 1984)(en banc)(while local governments can exempt industries from ad valorem taxation, the Mississippi Constitution limits the exemptions to a maximum of 10 years); City of Meridian v. Hill, 447 So. 2d 641, 644 (Miss. 1984)(on appeal, order of administrative agency shall be examined only as to whether or not decision was supported by substantial evidence, was arbitrary or capricious or unreasonable, or was entered in good faith); McGoldrick Oil Co. v. Greene County, 446 So. 2d 594, 595 (Miss. 1984)(although doctrine of sovereign immunity has been abolished, county may invoke the defense in causes of action accruing before July 1, 1984); Pearl River Valley Water Supply Dist. v. Hinds County, 445 So. 2d 1330, 1335-36 (Miss. 1984)(District can deduct authorized operation and maintenance expenses from its ad valorem tax proceeds and apply balance to retire bonds; if balance not sufficient to meet costs of bonds, District can make special levy under MISS. CODE ANN. § 51-9-139 (1972)).

[3] Pitts v. Mississippi State Bar Ass'n, Misc. No. 119, slip op. at 5 (Miss. Sept. 5, 1984)(even if general six-year statute of limitations applied to disciplinary proceedings, it would not bar action based on continuing misrepresentations), *original opinion withdrawn*, 462 So. 2d 340, 341 (Miss. 1985); *In re* Inquiry Concerning Judge Billy Gunn Brown, 458 So. 2d 681, 682 (Miss. 1984)(justice court judge removed from office and publicly reprimanded for converting to his personal use monies belonging to civil litigants in his court); Mississippi Attorney v. Mississippi State Bar, 453 So. 2d 1023, 1027-28 (Miss. 1984)(attorney accused of ethical violation must have opportunity to respond to evidence obtained after investigatory hearing; punishment for misconduct considered on a case-by-case basis); Burgin v. Mississippi State Bar, 453 So. 2d 689, 691 (Miss. 1984)(petition for reinstatement to state bar must comply with Rule 12 of Rules of Disci-

other boards and commissions.[6]

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pline by including all parties suffering pecuniary loss due to improper conduct, restitution, and reasons justifying reinstatement); *In re* Inquiry Concerning Judge William Anderson, 451 So. 2d 232, 234 (Miss. 1984)(judge's failure to remedy his practice concerning issuance of writs of garnishments and refunding garnishment costs is sufficient to warrant his removal from office); McIntosh v. Mississippi State Bar, 449 So. 2d 1203, 1204 (Miss. 1984)(attorney may not petition for reinstatement until expiration of three years after final judgment of disbarment, and petition must conform to requirements of Rule 12 of Rules of Discipline or MISS. CODE ANN. § 73-3-337 (Supp. 1984)); *In re* Inquiry Concerning Judge William Anderson, 447 So. 2d 1275, 1276-77 (Miss. 1984)(justice court judge may not serve part-time as city policeman; although judge's failure to issue writs of garnishments after receiving filing fees was improper, his conduct was not willful and did not warrant imposition of fine).

[4] Ivy v. State Dep't of Public Welfare, 449 So. 2d 779, 782 (Miss. 1984)(in paternity proceeding brought by Department of Public Welfare before death of putative father, standard of proof is by preponderance of evidence); Mississippi State Dep't of Public Welfare v. Howie, 449 So. 2d 772, 777 (Miss. 1984)(doctrine of sovereign immunity does not protect Department of Public Welfare from liability on its contract); McCollam v. State Dep't of Public Welfare, 447 So. 2d 650, 652-53 (Miss. 1984)(Department of Public Welfare may institute paternity and support proceedings under MISS. CODE ANN. § 43-19-31 (Supp. 1983) or § 93-9-9 (Supp. 1983), but venue for paternity suit is controlled by MISS. CODE ANN. § 93-9-17 (1972) and suit must be brought in county of father's residence if child custody is not in issue); Donaldson v. Pontotoc County Welfare Dep't, 445 So. 2d 1377, 1379 (Miss. 1984)(pro confesso decrees of paternity will stand where illiterate father had some means of obtaining advice and counsel).

[5] Mississippi Public Serv. Comm'n v. South Central Bell Tel. Co., 464 So. 2d 1133, 1138-40 (Miss. 1984)(en banc)(although proper base rate not determined, Public Serivce Commission not in error in finding utility failed to meet its burden of proving need and reasonableness of requested rate increase; actual use during period of time that had passed should be considered in standard of proof required for rate increase on projected year); Mississippi Power & Light Co. v. Conerly, 460 So. 2d 107, 113 (Miss. 1984)(eminent domain proceedings by utility company properly dismissed under MISS. CODE ANN. § 11-27-15 (1972) when property was not being taken for "public use" and no Mississippi customers would be served by transmission line), *appeal dismissed*, 105 S. Ct. 2353 (1985); Mississippi Power Co. v. Goudy, 459 So. 2d 257, 263, 273-74 (Miss. 1984)(en banc)(consumer has no property interest in just and reasonable public utility rates; MISS. CODE ANN. § 77-3-39 (1972), which allows prehearing rate increase under bond without notice to consumer, does not violate due process under United States or Mississippi Constitutions); Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd., 457 So. 2d 1298, 1316-18, 1323, 1325-28 (Miss. 1984)(State Oil and Gas Board is not preempted by federal law from promulgating rules for deregulated gas; state board has authority to require ratable taking from common pool; board has no authority to proscribe price differentials), *rev'd*, 54 U.S.L.W. 4114 (U.S. Jan. 22, 1986).

[6] Hudson v. Rausa, 462 So. 2d 689, 695-96 (Miss. 1984)(State Health Department employees have qualified immunity from civil suits for damages arising out of their official discretionary acts in formulating policies and administering treatment to prevent spread of communicable diseases); Board of Trustees v. Gates, 461 So. 2d 730, 737-38 (Miss. 1984)(school board decision not to rehire teacher upheld where substantial evidence of reason for decision was offered, even if her involvement in constitutionally pro-

Three decisions particularly merit discussion in this survey. During this term the court held that the exclusivity provision of the Workers' Compensation Act bars neither intentional tort claims against an employer[7] nor an employee's suit for the compensation carrier's intentional refusal to pay[8] and that the state Oil and Gas Board has proper authority to issue ratable take orders.[9]

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tected activities was factor in board's decision); Farrish Gravel Co. v. Mississippi State Highway Comm'n, 458 So. 2d 1066, 1068-70 (Miss. 1984)(Highway Commission may include in its contracts restrictive provisions to preclude adjustments of prices for fuel and construction materials after contract date for completion of project but may not make substantial changes in its contracts after construction begins); Hogan v. Mississippi Bd. of Nursing, 457 So. 2d 931, 934-35 (Miss. 1984)(to revoke nurse's license for misappropriation of narcotics under MISS. CODE ANN. § 73-15-29(1)(h)(Supp. 1982), Nursing Board must show misappropriation by clear and convincing evidence; failure to account for missing narcotics is not tantamount to misappropriation); Roberts v. Mississippi Republican Party State Executive Comm'n, 454 So. 2d 1309, 1309-10 (Miss. 1984)(en banc)(petition for rehearing granted provided that Mississippi Republican Party posts bond conditioned upon performance of lower court orders; no records classified as confidential according to MISS. CODE ANN. § 45-1-21 (1972) shall be furnished); Mississippi State Personnel Bd. v. Armstrong, 454 So. 2d 912, 915 (Miss. 1984)(failure to file bond under MISS. CODE ANN. §§ 11-51-93, -95 (1972) defeats circuit court jurisdiction to hear appeal from Employee Appeals Board); Lambert v. Schilling, 451 So. 2d 773, 775 (Miss. 1984)(Mississippi State Tax Commission Sales and Use Tax Rule 7(J) merely clarifies, rather than expands, MISS. CODE ANN. § 27-65-23 (Supp. 1984) to include coin-operated laundry receipts as amounts subject to sales tax); Curtis v. Mississippi Employment Sec. Comm'n, 451 So. 2d 736, 738 (Miss. 1984)(employees whose jobs were eliminated by technological changes and who chose leaves of absence rather than transfers requiring changes of residence were "unemployed" and entitled to benefits); Mississippi Employment Sec. Comm'n v. Borden, Inc., 451 So. 2d 222, 225 (Miss. 1984)(discharge of employee for excessive garnishments is discharge for misconduct connected with work under MISS. CODE ANN. § 71-5-513(A)(2)(Supp. 1983) precluding unemployment benefits); Peterson v. Sandoz, 451 So. 2d 216, 217-19 (Miss. 1984)(tax for criminal bail bonds does not violate equal protection where classification has reasonable relation to legitimate state interest); Collins v. North Miss. Sav. & Loan Ass'n, 445 So. 2d 828, 831-32 (Miss. 1984)(appeal from chancery court reversal of Board of Savings and Loan Association decision was not taken frivolously or in bad faith to subject party to penalty provided in MISS. CODE ANN. § 11-3-23 (Supp. 1983)).

[7] Miller v. McRae's, Inc., 444 So. 2d 368, 371-72 (Miss. 1984); *see infra* notes 21-47 and accompanying text.

[8] Southern Farm Bureau v. Holland, 469 So. 2d 55, 59 (Miss. 1984); *see infra* notes 58-73 and accompanying text.

[9] Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd., 457 So. 2d 1298, 1325-27 (Miss. 1984), *rev'd*, 54 U.S.L.W. 4114 (U.S. Jan. 22, 1986); *see infra* notes 88-131 and accompanying text.

I. Workers' Compensation

A. Background

Under workers' compensation legislation,[10] the employee gives up the right to sue his employer for "accidental" work-related injuries in return for a certain, albeit smaller, recovery.[11] Generally, once an injury is determined to be compensable under a workers' compensation act,[12] the act's exclusive remedy provision will bar a damage action

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[10] Workers' compensation originated in nineteenth century Germany some 25 years before its adoption by an American jurisdiction. 1 A. Larson, The Law of Workmen's Compensation § 5.00 (1982). On January 1, 1949, Mississippi became the last state to adopt the system. *Id.* at § 5.30. The Mississippi Workers' Compensation Act is codified at Miss. Code Ann. §§ 71-3-1 to -113 (1972 & Supp. 1984). Previously it was "workmen's compensation" but most states, including Mississippi, now term it "workers' compensation."

For a history and discussion of the early problems of the Mississippi system, see the symposium contained in 20 Miss. L.J. 115-248 (1949). The purpose of the Act was to compensate and rehabilitate the victims of industrial accidents. Worker's Compensation Act, ch. 354 § 1, 1948 Miss. Laws 507, 507 (codified as amended at Miss. Code Ann. § 71-3-1 (Supp. 1984)).

[11] Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C.I. & C. L. Rev. 555, 555-56 (1963); *see* V. Dunn, Mississippi Workmen's Compensation § 42 (3d ed. 1982)(cumulative limits on recovery). Prior to the adoption of workers' compensation legislation, an injured employee's only remedy was to sue his employer in tort. These suits were unsuccessful largely due to the employer's defenses of assumption of the risk, contributory negligence and the fellow servant rule. Note, Blankenship v. Cincinnati Milacron Chemical Co.: *Workers' Compensation and the Intentional Tort A New Direction for Ohio*, 12 Cap. U. L. Rev. 287, 288 (1982) [hereinafter referred to as Note, *Workers' Compensation and the Intentional Tort*]; *see also* S. Horovitz, Injury and Death Under Workmen's Compensation Laws 2-3 (1944)(no compensation was recovered in common law cases). As industry grew yet failed to adequately compensate victims of work-related accidents, it was determined that the costs of industrial injuries should be passed to those receiving the benefits of industrialization, *i.e.*, to the employer and ultimately to the consumer; this goal was accomplished through workers' compensation, which provided the worker with a guaranteed remedy. Note, *Workers' Compensation and the Intentional Tort*, *supra*, at 288-89.

While compensation is certain, benefit levels are low and have failed to keep up with inflation. Thus, as one commentator noted, employees now seek to avoid bringing their actions under compensation acts, while employers, who originally opposed compensation, advocate it to avoid paying larger damage verdicts. Note, Johns-Manville Products Corp. v. Superior Court: *The Not-So-Exclusive Remedy Rule*, 33 Hastings L. J. 263, 266 (1981).

[12] The general test of compensability under the Mississippi workers' compensation scheme is whether the accidental injury arose out of and in the course of employment. Dunn, *supra* note 11, § 156. The injury must arise within the time and space boundaries of the employment and in the course of an activity which furthers the employer's pur-

against the employer, even though the employee may not have applied for compensation.[13]

The courts, however, have recognized an exception to the employer's immunity to civil actions where the injuries are caused by the employer's intentional torts.[14] The primary rationale supporting this line of decisions is an employer may not claim that an injury he intentionally caused was an "accident" to be remedied exclusively under a workers' compensation act.[15] As a result of this rationale, an employee intentionally injured by his employer may be able to choose between claiming compensation and suing his employer at common law.[16]

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poses or interests directly or indirectly. Bivens v. Marshall R. Young Drilling Co., 251 Miss. 261, 273-74, 169 So. 2d 446, 451 (1964)(citing 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 14 (1964)).

In Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 890 (Miss. 1980), the Mississippi Supreme Court, in granting benefits for injuries caused by a third party's intentional tort, noted that the language "arising out of" requires a causal connection between the employment and the injury. It is not required that the employment be the only cause of the injury, for it is enough if it rationally contributes to the employee's injury. *Id.* The requirement "in the course of" is met if the injury resulted from an activity which is actuated by a duty to serve the employer or is reasonably incidental to the employment. *Id.*

[13] 2A A. LARSON, *supra* note 10, § 65.14 (1982). Conversely, if the employee can show that he does not qualify for compensation coverage, he then may utilize his common law right of action against his employer. Page, *supra* note 11, at 559; *see* Note, *Workers' Compensation and the Intentional Tort*, *supra* note 11, at 293 (majority view holds common law action not barred if injury not compensable under Act).

[14] *See, e.g.*, Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233, 234 (1930)(employee assaulted by employer may sue for damages); Leopold v. Britt, 58 App. Div. 2d 856, 396 N.Y.S. 2d 680, 682 (1977)(judicial exception to exclusivity of workers' compensation remedy exists when employer commits, instigates or abets assault on employee); Blankenship v. Cincinnati Milacron Chemicals, Inc., 69 Ohio St. 2d 608, 433 N.E.2d 572, 576 (1982)(employee may bring damage suit for employer's intentional torts), *cert. denied*, 459 U.S. 857 (1982). *But see, e.g.*, Azevedo v. Abel, 264 Cal. App. 2d 451, 459, 70 Cal. Rptr. 710, 715 (1968)(compensation coverage is defense to employee's civil action for injury caused by employer's intentional tort).

For a discussion of legislation authorizing employee tort actions as well as compensation for intentional torts by employers, see Love, *Punishment and Deterrence: A Comparative Study of Tort Liability For Punitive Damages Under No-Fault Compensation Legislation*, 16 U.C.D. L. REV. 232, 252-57 (1983). For a list of statutes allowing both types of actions, see Comment, *Intentional Employer Torts: A Matter for the California Legislature*, 15 U.S.F.L. REV. 651, 673 n. 117 (1981).

[15] 2A A. LARSON, *supra* note 10, § 68.11. Another theory states that the employer severed the employment relation by his act of violence. *Id.* The problem with this theory is that the employee may continue to work for the employer after the injury; thus, the employment relationship has not actually ceased. *Id.* One other theory that Larson terms even more fictitious states that the act does not "arise out of the employment." *Id.*

[16] 2A A. LARSON, *supra* note 10, § 68.12; *see* Magliulo v. Superior Court, 47 Cal.

B. *Intentional Torts by Employer*

The issue of whether a common law action is excluded by a compensation act becomes more difficult, however, when the intentional tort is not personally committed or expressly authorized by the employer. Although an employer is generally immune from employee actions to recover for work-related injuries intentionally caused by fellow employees[17] or supervisors,[18] such actions may be allowed when the in-

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App. 3d 760, 121 Cal. Rptr. 621, 636 (1975)(remedies are cumulative or alternative until compensation or damages received); Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233, 234 (1930)(employee may elect tort action or compensation for intentional injury). *See generally* Comment, *Workers' Compensation in Ohio: Scope of Employment and the Intentional Tort*, 17 AKRON L. REV. 249, 258-59 (1983)(conflicting authority on election of remedies issue).

Professor Larson explains that this option arises by analyzing the incident as "accidental" or "intentional" depending upon the viewpoint of the person having the burden of establishing his case or defense. 2A A. LARSON, *supra* note 10, § 68.12. If the employee sought compensation benefits, an injury caused by an intentional act would be "accidental," and therefore compensable, since from his point of view, it was an "unexpected and untoward mishap." *Id.; see, e.g.*, L. B. Priester & Son v. McGee, 234 Miss. 471, 477-79, 106 So. 2d 394, 397 (1958)(in compensation cases, expectation of the workman determines what is "accidental"). In a civil action, however, the employer would have to affirmatively plead the exclusiveness of the compensation act by stating that the injury resulted from an accident. 2A A. LARSON, *supra* note 10, § 68.12; *see, e.g.*, Seal v. Indus. Elec., Inc., 362 F.2d 788, 789 (5th Cir. 1966)(where exclusive coverage of worker's compensation is not presumed, employer must plead and prove coverage as affirmative defense. The employer would likely be unable to prove that it was "accidental" since it was he who intentionally caused the employee's injury; from the employer's point of view the injury was intentional, not accidental. 2A A. LARSON, *supra* note 10, § 68.12.

[17] 2A A. LARSON, *supra* note 10, § 68.12. The Mississippi Supreme Court has allowed compensation benefits for injuries caused by the willful acts of co-employees when the injuries arose out of and in the course of the employment. *See* Watson v. National Burial Ass'n, 234 Miss. 749, 752-53, 107 So. 2d 739, 740-41, 743 (1958)(compensation allowed when employee shot by co-employee); Mutual Implement & Hardware Ins. Co. v. Pittman, 214 Miss. 823, 828, 844, 59 So. 2d 547, 548, 556 (1952)(compensation allowed for employee hit with shovel by fellow employee). *See generally* DUNN, *supra* note 11, §§ 160-61 (assaults by fellow employees are compensable).

[18] 2A A. LARSON, *supra* note 10, § 68.21; *see, e.g.*, Elliot v. Brown, 569 P.2d 1323, 1325-26 (Alaska 1977)(compensation act is exclusive remedy for assault by supervisor); Kerr-McGee Corp. v. Hutto, 401 So. 2d 1277, 1278, 1282 (Miss. 1981)(compensation allowed when employee shot by supervisor); Daniels v. Swofford, 286 S.E.2d 582, 585 (N.C. App. 1982)(refused to impute assault by supervisor to corporate employer). *But see*, Lavin v. Goldberg Bldg. Material Corp., 274 App. Div. 690, 87 N.Y.S.2d 90, 93-94 (1949)(action sustained against corporate employer for assault by foreman), *appeal denied*, 275 App. Div. 865, 89 N.Y.S.2d 523 (1949). *See generally* Note, *Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV. 890, 898-900 (1983)(discussion of vicarious liability problems when supervisor intentionally injures employee).

tentional tort was committed by the "alter ego" of a corporate employer.[19] When the employer creates a job which inherently involves the use of force, such as security, intentional torts incident to that job may be imputed to the employer.[20]

The Mississippi Supreme Court, during its last term, held in *Miller v. McRae's, Inc.*[21] that the Mississippi Workers' Compensation Act[22] did not provide the employee's exclusive remedy for a claim based upon false imprisonment by her employer.[23] In *Miller*, the plaintiff brought an action against her employer, McRae's, alleging that, while at work, she had been falsely imprisoned in a McRae's office while the head of store security questioned her concerning money missing from her department.[24] Miller contended that as a result of this willful and malicious conduct on the part of McRae's, she had suffered

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[19] *See, e.g.*, Heskett v. Fisher Laundry & Cleaners Co., 217 Ark. 350, 230 S.W.2d 28, 31 (1950)(corporation liable for assault by officer and general manager); Singer Shop-Rite, Inc. v. Rangel, 174 N.J. Super. 442, 416 A.2d 965, 967 (1980)(corporation liable for assault and battery by employees acting with "corporate intent"); *see also*, 2A A. LARSON, *supra* note 10, § 68.22 (distinguishing between supervisory employee and corporation's alter ego).

[20] Page, *supra* note 11, at 565; *see* Barnes v. Chrysler Corp., 65 F. Supp. 806, 808 (N.D. Ill. 1946)(employees assaulted and falsely imprisoned by guards could sue employer in tort); Smith v. Rich's, Inc., 104 Ga. App. 883, 123 S.E.2d 316, 317-18 (1961)(sales clerk falsely imprisoned in employer's "protection department" allowed to sue employer). *But see* Bakker v. Baza'r, Inc., 275 Or. 245, 551 P.2d 1269, 1274 (1976)(ratification of guard's assault on employee not sufficient to impute intentional tort to employer).

Larson notes that damage actions should be allowed when the character of the tort is such that some type of employer direction or intent is shown. 2A A. LARSON, *supra* note 10, § 68.23. He argues, however, that merely creating a job which encompasses the intentional use of force should not always subject an employer to liability in tort. *Id.* Since the use of force is legitimate in certain areas of employment, Larson contends that the employer should not forfeit his compensation defense merely because he negligently failed to prevent the use of a greater degree of force than the law allows. *Id.*

[21] 444 So. 2d 368 (Miss. 1984).

[22] MISS. CODE ANN. §§ 71-3-1 to -113 (1972 & Supp. 1984).

[23] *Miller*, 444 So. 2d at 370, 372; *see* Skelton v. W. T. Grant Co., 331 F.2d 593, 595 (5th Cir. 1964)(applying Georgia law)(employee action against employer for false imprisonment not barred by compensation act); Barnes v. Chrysler Corp., 65 F. Supp. 806, 808 (N.D. Ill. 1946)(same); Smith v. Rich's, Inc., 104 Ga. App. 883, 123 S.E.2d 316, 317-18 (1961)(same); Moore v. Federal Dep't Stores, Inc., 33 Mich. App. 556, 190 N.W.2d 262, 264 (1971)(same).

[24] *Miller*, 444 So. 2d at 369. Miller also brought action against Jamal El-Amin, McRae's head of security who questioned her. *Id.* Miller claimed that the defendant used an implied threat of force to keep her from using the telephone or moving freely while detained in the store office. *Id.*

great humiliation, loss of reputation and physical illness.[25] The circuit court dismissed the action against McRae's without prejudice, holding that Miller's exclusive remedy was under the Workers' Compensation Act.[26]

On appeal, the Mississippi Supreme Court noted that the Workers' Compensation Act provides an employee's exclusive remedy when the injury falls within the scope of the Act.[27] For the Act's exclusive remedy provision to apply, the court held that the injury must not only arise out of and in the course of employment, but it must also be compensable under the Workers' Compensation Act.[28] If the injury is not compensable under the Act, then the Act does not provide the exclusive remedy.[29]

To determine if Miller's injury was compensable, the court examined the Act's definition of injury.[30] Section 71-3-3(b)[31] defines "injury" as an "accidental injury . . . arising out of and in the course of employment, . . . and also includes an injury caused by the willful act of a third person directed against an employee because of his employment while so employed and working on the job. . . ."[32] The court first noted that any injury sustained from false imprisonment was not the result of an accident, but of a willful act.[33] The court then interpreted the statute's inclusion of the willful act of a "third person" to mean

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[25] *Id.* Miller sought $300,000 actual damages and $500,000 punitive damages. *Id.*

[26] *Id.* at 369-70. The exclusive remedy section of MISS. CODE ANN. § 71-3-9 (1972) provides:

> The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

Id.

[27] *Miller*, 444 So. 2d at 370. For a discussion of the origin and extent of the Act, see *supra* notes 10-11 and accompanying text.

[28] *Id.* at 372; *see supra* note 12.

[29] *Id.*; *see supra* note 13.

[30] *Id.* at 370-71.

[31] MISS. CODE ANN. § 71-3-3(b)(Supp. 1984).

[32] *Id.*

[33] *Miller*, 444 So. 2d at 370.

either a stranger to the employer-employee relationship[34] or a fellow employee acting outside the scope and course of his employment.[35] The court held, however, that when "an injury is caused by the willful act of an employee acting in the course and scope of his employment,"[36] then the Workers' Compensation Act does not provide an exclusive remedy to the injured person.[37] Noting that the intent of the Act was not to preclude an employee from seeking a common law remedy for an injury resulting from a willful and malicious act,[38] the court held that Miller's claim of false imprisonment was not barred by the exclusivity of remedies provision of the Act.[39]

In reaching this holding, the court distinguished two prior deci-

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[34] *Id.* at 371. The Mississippi Supreme Court has held employers liable under the Act for employee injuries caused by the willful acts of persons who were not connected to the employer-employee relationship. *See, e.g.*, Johnson v. Roundtree, 406 So. 2d 810, 810-11 (Miss. 1981)(allowed compensation benefits for assault and fatal shooting of cab-driver by unknown assailant); John Hancock Trucking Co. v. Walker, 243 Miss. 487, 493-94, 138 So. 2d 478, 479-80 (1962)(benefits allowed for truck driver shot by third party); *see also*, Williams v. Munford, Inc., 683 F.2d 938, 941 (5th Cir. 1982)(workers' compensation was exclusive remedy of clerk raped during robbery). Such an injury is compensable under the Act, however, only when the injury arose "out of and in the course of" employment, and the willful act was directed against the employee "because of" his employment. MISS. CODE ANN. § 71-3-3(b)(Supp. 1984); *see supra* text accompanying notes 31-32; *see also*, *supra* note 12. Since the statutory definition of injury uses inclusive, rather than exclusive, language regarding third party intentional acts, it prescribes recovery whenever the injury can be viewed as occurring "because of" the employment. All that is needed is a rational connection between the injury and the employment. Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 890-91 (Miss. 1980).

If the reason for the willful act is personal, however, and not because of the employment, the injury is not compensable. *See* Dewberry v. Carter, 218 So. 2d 27, 30 (Miss. 1969)(denied compensation where employee killed for personal reasons); Ellis v. Rose Oil Co., 190 So. 2d 450, 450 (Miss. 1966)(compensation denied where employee's death resulted from his affair with married woman); Estate of West v. Southern Bell Tel. & Tel. Co., 228 Miss. 890, 893, 897, 90 So. 2d 1, 2, 4 (1956)(compensation denied where employee killed by jilted lover); Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 635, 59 So. 2d 294, 299-300 (1952)(compensation denied where employee's death resulted from affair with married woman).

[35] *Miller*, 444 So. 2d at 371.

[36] *Id.*

[37] *Id.* The court has repeatedly allowed employees to recover compensation benefits for injuries intentionally caused by co-employees. *See supra* note 17. The status of the employee inflicting the injury was irrelevant. *Miller*, 444 So. 2d at 371. Unlike the willful acts of strangers to the employment relationship, *see supra* note 34, willful acts by fellow employees need not be directed against the employee "because of his employment" in order to result in a compensable injury. DUNN, *supra* note 11, § 160.

[38] *Miller*, 444 So. 2d at 371.

[39] *Id.* at 372.

sions dealing with an employer's immunity in tort[40] and expressly overruled a third decision which held that the Workers' Compensation Act provides an employee's exclusive remedy for a trespass claim against his employer.[41]

There are several problems inherent in the *Miller* decision. First, rather than merely holding that the employer could not raise the exclusivity of remedies provision of the Act as a defense in actions based on his intentional torts,[42] the court appeared to hold that an injury willfully and maliciously caused by or attributable to the employer is not compensable under the Workers' Compensation Act.[43] Second, the

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[40] *See id.* at 371. In Brown v. Estess, 374 So. 2d 241 (Miss. 1979), the father of a deceased employee brought a wrongful death action against the employer's board of directors and its corporate officer, the general manager, alleging that their negligence caused his son to suffocate in a soybean bin. *Id.* at 241. The *Brown* court pointed out that the Act barred an employee from bringing an action against a co-employee for negligently causing a work-related injury. *Id.* (citing McCluskey v. Thompson, 363 So. 2d 256, 259 (Miss. 1978)). Unable to draw a distinction between a fellow employee and a corporate officer or agent who was acting within the scope of his authority for and on behalf of the corporate employer, the court held plaintiff's exclusive remedy was under the Act. *Brown*, 374 So. 2d at 242-43. The *Miller* court held *Brown* was distinguishable because it dealt with an allegation of negligence rather than a willful and malicious act. *Miller*, 444 So. 2d at 371.

In Taylor v. United States Fidelity & Guaranty Co., 420 So. 2d 564 (Miss. 1982), plaintiff brought a tort action against a compensation carrier and its representatives for bad faith and malicious refusal to pay workers' compensation benefits. *Id.* at 564-65. The court held the tort action was barred by the Workers' Compensation Act. *Id.* at 566. The *Miller* court noted that the plaintiff in *Taylor* was merely seeking compensation to which he was entitled under the Act. The court pointed out that since the Act specifically provides a penalty for bad faith refusal to pay, the Act was Taylor's exclusive remedy. *Miller*, 444 So. 2d at 371. For a further discussion of *Taylor*, *see infra* notes 65-66.

[41] *Miller*, 444 So. 2d at 371-72. The case was Rico v. Precision Eng'g & Mfg. Co., 381 So. 2d 170 (Miss. 1980). In *Rico*, when the plaintiff did not show up for work, the vice-president of the company broke the lock on his personal toolbox and removed needed blueprints of the job on which the plaintiff had been working. Plaintiff brought an action against his employer for trespass to chattels which resulted in his mental suffering. *Id.* at 170-71. The Mississippi Supreme Court held that the plaintiff's injuries, if any, arose out of and in the course of his employment and that his exclusive remedy was under the Workers' Compensation Act. *Id.* at 172. The *Miller* court stated that the *Rico* decision failed to examine the Code's definition of "injury." *Miller*, 444 So. 2d at 372. The *Miller* court found that *Rico* only focused on whether the injury arose out of the employment rather than analyzing the additional question of whether that injury was compensable under the Act. *Id.* For this failure to fully analyze the injury, the *Miller* court overruled *Rico*. *Id.*

[42] *See supra* note 16 and accompanying text.

[43] *See* text accompanying notes 30-38. The court's use of the language "willful and malicious act," rather than "intentional tort," may also present a problem. The almost unanimous rule states that the intentional tort exception cannot be extended to include

court appeared to hold that an injury caused by the willful act of a co-employee acting in the course and scope of his employment and in the furtherance of his employer's business is not compensable.[44] Both propositions are contrary to principles of workers' compensation law.[45]

The third problem with the decision is its lack of clarity concerning the reason for imputing the willful acts of an employee to the employer. While such a holding could be supported in this case,[46] it could be argued that the court imputed liability solely because the employee was acting within his employment and in furtherance of his employer's business. This alone should not be considered in all cases as a sufficient basis upon which to impute an employee's intentional torts to the employer.[47]

C. *Compensation Carrier's Intentional Refusal to Pay*

While most states that have a workers' compensation system preserve the employee's right to sue third parties,[48] many extend the employer's immunity against civil actions to the compensation insurer,[49]

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injuries caused by the employer's willful misconduct. There must be an actual intent to injure. 2A A. LARSON, *supra* note 10, § 63.13; *see also* DUNN, *supra* note 11, § 22 (discussion of type of employer intent required). *See generally* Note, *supra* note 18, at 900-10 (courts' hesitancy in expanding exception to willful employer misconduct); Note, *Tort—Worker Compensation—Employer Immunity—An Employee Is Not Precluded By The Ohio Workers' Compensation Laws From Enforcing A Common Law Remedy For Intentional Torts Committed By His Employer*, 51 U. CIN. L. REV. 682, 691-96 (discussion of intentional and willful employer misconduct).

[44] *See supra* text accompanying notes 34-37.

[45] *See supra* notes 12, 16-18, 37. Some jurisdictions deny coverage for employees' injuries caused by willful assaults of their employers. In Mississippi, however, assaults by employers, supervisors or fellow employees have been covered "whenever it appears that the work environment is a contributing factor in bringing about the assault." DUNN, *supra* note 11, § 27.

[46] *See supra* note 20 and accompanying text.

[47] Unless the employer ordered or expressly authorized the act, it cannot be intentional from his standpoint. 2A A. LARSON, *supra* note 10, § 68.21.

[48] Comment, *Co-Employee and Workmen's Compensation Carrier Suits—Common-Law Assault Upon Workmen's Compensation Exclusivity in Alabama*, 11 CUM. L. REV. 639, 640 (1980); *see* 2A A. LARSON, *supra* note 10, § 71.10 (where stranger's negligence causes injury to worker, stranger should not be freed from his obligation to pay damages). MISS. CODE ANN. § 71-3-71 (1972) provides in pertinent part:

> The acceptance of compensation benefits from or the making of a claim for compensation against an employer or insurer for the injury or death of an employee shall not affect the right of the employee or his dependents to sue any other party at law for such injury or death. . . .

Id.

[49] *See generally* Larson, *Workmen's Compensation Insurer as Suable Third Party*,

either by statutory provisions[50] or by viewing the insurer as the employer's "alter ego."[51] Thus, when employees have sought to impose tort liability on insurers for wrongful delay or refusal to make benefit payments, some courts have held that the action was barred by the Act's exclusive remedy provision.[52] Other courts have held, however, that when the carrier's wrongful delay or refusal to pay was intentional, rather than merely negligent, a common law action by the employee was not barred.[53]

There are several rationales supporting the decisions to allow the employee to sue the carrier for intentional torts. Courts have most frequently upheld the right to bring the action on the ground that the

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1969 DUKE L. J. 1117, 1117-43 (analysis of suability of compensation carriers); Marks, *Erosion of the Exclusive Workers' Compensation Remedy: Suits Against Coemployees and Compensation Carriers*, 17 FORUM 395, 401-06 (1981)(discussion of carrier immunity for negligent and intentional acts).

[50] *See, e.g.*, ALA. CODE § 25-5-1(4)(1975)(term "employer" includes insurer); COLO. REV. STAT. ANN. § 8-42-102(1973)(neither employer nor insurer shall be subject to other liability to employee); GA. CODE ANN. § 34-9-1(3)(Supp. 1984)(term "employer" includes insurer of worker's compensation benefits); TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon 1967)(Employers' Insurance Association shall not be liable for accidents it might have prevented through its safety programs).

[51] *E.g.*, Whitten v. American Mutual Liab. Ins. Co., 468 F. Supp. 470, 474-75 (D.S.C. 1977)(in action for intentional tort, carrier immune as employer's "alter ego"), *aff'd mem.*, 594 F.2d 860 (4th Cir. 1979); Bartolotta v. United States, 276 F. Supp. 66, 71 (D. Conn. 1967)(insurer immune from common law actions as employer's "alter ego"), *aff'd sub nom.* Bartolotta v. Liberty Mutual Ins. Co., 411 F.2d 115 (2d Cir. 1969).

[52] *See, e.g.*, Escobedo v. American Employers Ins. Co., 547 F.2d 544, 545 (10th Cir. 1977)(applying New Mexico law)(exclusive remedy provision bars tort claim for good or bad faith denial of compensation); Sandoval v. Salt River Project Agricultural Improvement & Power Dist., 571 P.2d 706, 711 (Ariz. Ct. App. 1977)(compensation act is exclusive remedy for torts based on negligent or intentional withholding of benefits); Young v. United States Fidelity & Guaranty Co., 588 S.W.2d 46, 48 (Mo. Ct. App. 1979)(compensation act would be sole remedy for bad faith refusal to pay benefits).

[53] *See, e.g.*, Hollman v. Liberty Mutual Ins. Co., 712 F.2d 1259, 1262 (8th Cir. 1983)(applying South Dakota law)(exclusivity provision does not bar action against carrier for intentional refusal to pay benefits); Reed v. Hartford Accident & Indemnity Co., 367 F. Supp. 134, 135-36 (E.D. Pa. 1973)(Act does not bar claim against insurer for intentional failure to pay); Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43-44 (Alaska 1974)(intentional misconduct may defeat carrier's immunity from suit), *overruled on other grounds*, Cooper v. Argonaut Ins. Co., 556 P.2d 525 (Alaska 1976). *See generally* 2A A. LARSON, *supra* note 10, § 68.34(b)-(c)(actions based on carrier's intentional harassment of employee); Lambert, *Workers' Compensation—Third-Party Suits— Compensation Carrier and Its Adjuster Suable as Third Parties for Intentional Torts in Processing and Handling of Workers' Compensation Claims Despite Exclusivity Clause in Compensation Act*, 23 ATLA L. REP. 300, 300-01 (1980)(discussion of actions against insurers for intentional torts).

tortious conduct upon which the suit is brought does not arise out of the employment relationship.[54] Rather, the injury for which recovery is sought is a separate injury from the original work-related injury and arises out of the carrier's independent relationship with the employee.[55] Since the injury is not work-related, it is not covered by the exclusive remedy provisions and a common law action is not barred.[56] Courts have also reasoned that provisions imposing a monetary penalty for delay in making payments were never intended to exclude every other remedy for intentional wrongdoing.[57]

Last term, in *Southern Farm Bureau Casualty Insurance Co. v. Holland*,[58] the Mississippi Supreme Court addressed the issue of a

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[54] *E.g.*, Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220, 222 (Me. 1978)(when injury does not arise from employment relationship, immunity from suit is not available to compensation carrier); Hayes v. Aetna Fire Underwriters, 187 Mont. 148, 609 P.2d 257, 261 (1980)(civil suit allowed when injury was separate from original work-related injury and employment relationship); Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W.2d 220, 223 (1979)(same); *see supra* note 12 (injury must arise out of employment to be compensable under workers' compensation act).

[55] *See* Hayes v. Aetna Fire Underwriters, 187 Mont. 148, 609 P.2d 257, 261 (1980)(carrier has independent relationship to employee when it commits intentional tortious acts).

In Unruh v. Truck Ins. Exchange, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972), the California Supreme Court held that a compensation carrier was not immune at common law for intentional torts committed during the investigation of a claim. The court reasoned that when the insurer committed intentional torts, it was no longer in the role of a carrier but became a "third person" amenable to suit. *Unruh*, 498 P.2d at 1073. The *Unruh* court's use of the dual capacity doctrine to impose liability on the carrier has been severely criticized. *See* 2A A. LARSON, *supra* note 10, § 68.34(b)(*Unruh* holding seemingly applies only to carriers and not to employers). For a discussion of the dual capacity doctrine, see 1979 Mississippi Supreme Court Review, Administrative Law, 50 MISS. L.J. 699, 701-06 (1979).

[56] *See* Coleman v. American Universal Ins. Co., 86 Wis. 2d 615, 273 N.W.2d 220, 223 (1979)(exclusive remedy provision was no bar when action was based on intentional act rather than work-related injury); *see also* Broaddus v. Ferndale Fastener Div., 84 Mich. App. 593, 269 N.W.2d 689, 693 (1978)(nonphysical injuries were not within coverage of Act and exclusive remedy provision did not bar civil action). In *Broaddus*, an employee sued the compensation carrier, seeking damages for emotional distress caused by the carrier's alleged wrongful and intentional denial of benefits. *Broaddus*, 269 N.W.2d at 691. The court held that since the essence of the tort and of the damages alleged was nonphysical, the injuries were not compensable under the compensation act for work-related injuries, and the civil suit was not barred. *Id.* at 692-93. *See generally* 2A A. LARSON, *supra* note 10, § 68.34(a)(discussion of compensability of damages caused by intentional infliction of emotional distress).

[57] *See, e.g.*, Stafford v. Westchester Fire Ins. Co., 526 P.2d 37, 43 (Alaska 1974)(penalty provision not intended as exclusive remedy for all intentional acts); Gibson v. National Ben Franklin Ins. Co., 387 A.2d 220, 223 (Me. 1978)(same).

[58] 469 So. 2d 55 (Miss. 1984).

compensation carrier's immunity for its intentional refusal to pay compensation benefits.[59] In *Southern Farm Bureau*, the plaintiff[60] sued her employer's compensation carrier, alleging that the carrier's refusal to pay benefits was intentional misconduct designed to coerce her to accept an inadequate settlement of the claim.[61] She sought damages for tortious breach of contract, breach of fiduciary duties and intentional infliction of mental distress.[62]

The circuit court overruled defendant's motion to dismiss the claim but granted an interlocutory appeal.[63] On appeal, the carrier argued that the exclusive remedy provision of the Workers' Compensation Act[64] and a prior decision refusing to allow a tort action based on a carrier's refusal to pay benefits barred the plaintiff's action.[65] The Mississippi Supreme Court held that the prior decision was based on a negligent, rather than intentional, refusal to pay[66] and noted that its

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[59] *Id.* at 56.

[60] Plaintiff was Clara J. Holland, a meat wrapper at the K & B Slaughter House. *Id.* She died subsequent to the appeal of the case and the cause was revived by her estate. *Id.* at 56 n.1.

[61] *Id.* at 56. In October, 1977, plaintiff suffered a back injury while lifting a tray of meat and as a result underwent surgery. *Id.* Defendant paid plaintiff's medical bills and temporary total benefits until it terminated the payments in July, 1979. The carrier resumed the payments pursuant to an order of the Mississippi Workers' Compensation Commission in September, 1981. *Id.* The plaintiff then filed suit based on an intentional refusal to pay the prior benefits. *Id.*

[62] *Id.* Plaintiff sought $1,000,000 in compensatory damages and $5,000,000 in punitive damages. *Id.*

[63] *Id.* Dissenting from the majority opinion, Justice Hawkins argued that the interlocutory appeal should not have been granted and that the court was without authority to hear the appeal. *Id.* at 60-62 (Hawkins, J., dissenting).

Justice Anderson, who was not a member of the court when this case was originally decided but was sitting for the petition for rehearing, specially concurred with the majority. *Id.* at 62 n.1 (Anderson, J., specially concurring). Justice Anderson urged that an interlocutory appeal is an appropriate procedure to dispense with a controlling question of law, and that such procedure will expedite the litigation or avoid unnecessary expense. *Id.* at 63-64 (Anderson, J., specially concurring).

[64] MISS. CODE ANN. § 71-3-9 (1972). For the statutory language, see *supra* note 26.

[65] *Southern Farm Bureau*, 469 So. 2d at 57. Defendant asserted that Taylor v. United States Fidelity & Guaranty Co., 420 So. 2d 564 (Miss. 1982), was controlling. Although there was not an explicit allegation of an intentional tort in *Taylor*, the defendant contended that the plaintiff's claim in the present action was essentially identical to *Taylor* both as to the basis of the claim (malicious denial of a compensation claim) and the type of damages alleged (emotional and mental injury). *Southern Farm Bureau*, 469 So. 2d at 57.

[66] *Southern Farm Bureau*, 469 So. 2d at 57. The declaration in *Taylor* alleged that the carrier "negligently, carelessly, wrecklessly [sic], willfully and hazardiously [sic], failed, refused and neglected to process legitimate medical claims . . . ." Taylor v.

prior decisions supported a distinction between actions based on negligence and those based on intentional torts.[67] Further, the court held that the statutory penalties for non-payment of compensation,[68] while sufficient for negligent conduct, were inadequate to deter intentional misconduct and were never intended to be the sole remedy for intentional torts.[69]

Following the majority view,[70] the court noted that the carrier was not the "alter ego" of the employer but instead had an independent relationship with the employee when committing intentional acts.[71] Since the Workers' Compensation Act exclusivity provision[72] covered liability only for work-related injuries, not independent intentional torts, the court held the action against the carrier was not barred.[73]

United States Fidelity & Guaranty Co., 420 So. 2d 564, 564 (Miss. 1982). Nevertheless, the court in *Southern Farm Bureau* stated that the *Taylor* pleading "sounds in negligence" and did not allege an intentional tort. *See Southern Farm Bureau*, 469 So. 2d at 57.

Justice Walker, joined by Justice Roy Noble Lee, dissented, arguing that the declaration in *Taylor* alleged willful, rather than merely negligent, acts. *Id.* at 59 (Walker, J., dissenting). Since the complaints in *Taylor* and the case sub judice were indistinguishable, he contended that *Taylor* was controlling and the case should have been dismissed. *Id.* at 59-60 (Walker, J., dissenting).

[67] *Southern Farm Bureau*, 469 So. 2d at 57-58. The court relied on McCluskey v. Thompson, 363 So. 2d 256, 264 (Miss. 1978)(action against co-employee for negligence, as opposed to intentional tort, barred by exclusivity provision) and Miller v. McRae's, Inc., 444 So. 2d 368, 372 (Miss. 1984)(action against employer for intentional tort of false imprisonment not barred).

[68] *See* MISS. CODE ANN. § 71-3-37(5), (6)(1972)(10% and 20% penalties for non-payment of benefits).

[69] *Southern Farm Bureau*, 469 So. 2d at 58; *accord* Stafford v. Westchester Fire Ins., Co., 526 P.2d 37, 42-43 (Alaska 1974)(penalty provision not intended as exclusive remedy for all intentional torts). In examining the deterrence aspect of the penalty provision for intentional misconduct, the *Southern Farm Bureau* court noted that the maximum penalty for the denial of plaintiff's benefits before the commission order would have been only $2.50 per week. *Southern Farm Bureau*, 469 So. 2d at 58.

[70] *Southern Farm Bureau*, 469 So. 2d at 58. The court stated that the majority of courts addressing the question had held that exclusivity provisions did not bar the employee's action against the carrier for an intentional tort. *Id.* Larson has stated, however, that in the majority of cases involving tort actions based on intentional delay or termination of benefits, no cause of action was found to exist. He noted that in those cases allowing a tort action, the carrier's conduct was usually "conspicuously contemptible." 2A A. LARSON, *supra* note 10, § 68.34(c).

[71] *Southern Farm Bureau*, 469 So. 2d at 58; *see supra* notes 55-56.

[72] *See supra* note 26.

[73] *Southern Farm Bureau*, 469 So. 2d at 59. The court noted that permitting the action for an independent tort was consistent with decisions recognizing that punitive damages are appropriate when an insurer intentionally and in bad faith refuses payment

II. Oil and Gas Board

A. Background

Oil and gas are found in pools which may lie beneath the property of various landowners. Since a well producing from the pool creates a low pressure area to which the oil and gas migrates, a landowner with a recovery well can drain the minerals located beneath the land of another.[74] To prevent drainage and protect the correlative rights of owners in a pool,[75] almost every oil and gas producing state requires that a purchaser take gas ratably from the wells and owners in a pool without discrimination, or unreasonable discrimination, as to price or amount.[76]

The states' authority to establish minimum wellhead prices and to require an interstate pipeline to take ratably has been upheld against due process, equal protection and commerce clause challenges.[77] In 1963, however, the United States Supreme Court invalidated such a requirement on federal preemption grounds.[78] In *Northern Natural Gas Co. v. State Corp. Commission of Kansas*,[79] the Court held that such orders invaded the exclusive jurisdiction over interstate gas conferred upon the Federal Power Commission (FPC)[80] by the Natural Gas Act of 1938 (NGA).[81] Under the NGA, the FPC's jurisdiction and

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of a legitimate claim. *Id.* at 58-59 (citing Reserve Life Ins. Co. v. McGee, 444 So. 2d 803 (Miss. 1983) and Standard Life Ins. Co. v. Veal, 354 So. 2d 239 (Miss. 1978)). For a discussion of bad faith refusal to pay insurance claims, see generally Freeland & Freeland, *Bad Faith Litigation: A Practical Analysis*, 53 Miss. L.J. 237 (1983).

[74] Shell Oil Co. v. James, 257 So. 2d 488, 494-95 (Miss. 1971).

[75] *See* Taylor, *The Excess Gas Market—Recent Legal Problems Precipitated By Excess Gas Deliverability, and Applicable Regulatory Provisions*, 35 Inst. on Oil & Gas L. & Tax'n 87, 95-96 (1984)(explanation of need for ratable taking from given pool). For an identification of the correlative rights of landowners, see 1 E. Kuntz, Law of Oil and Gas § 4.3 (1962).

[76] Taylor, *supra* note 75, at 93-94; *see, e.g.*, Kan. Stat. Ann. § 55-603, -703 (1983); La. Rev. Stat. Ann. § 30:42 (West 1975); Tex. Nat. Res. Code Ann. §§ 111.086-.087 (Vernon 1978). A ratable take by producers and purchasers enables each owner to recover a "fair share" of the oil or gas beneath his property in comparison to the other owners in the common pool. *See* 8 Williams & Meyers, Oil and Gas Law: Manual of Oil and Gas Terms 721 (1984)(definition).

[77] *See* Cities Serv. Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 185-86, 188 (1950)(state order directing interstate pipeline to take ratably at a minimum price did not violate due process, equal protection or commerce clause).

[78] Northern Natural Gas Co. v. State Corp. Comm'n of Kan., 372 U.S. 84, 91-92, 98 (1963).

[79] 372 U.S. 84 (1963).

[80] *Id.* at 89, 91-92. The Court found that state ratable take orders could not remain "in the face of the pervasive scope of federal occupation of the field." *Id.* at 98.

[81] 15 U.S.C. §§ 717-717w (1982).

its authority to regulate natural gas prices extended to all interstate gas from its first wellhead sale.[82] To escape FPC regulation and obtain higher unregulated prices, producers began to sell their gas in the intrastate market.[83] To combat the severe interstate gas shortages which resulted,[84] Congress enacted the Natural Gas Policy Act of 1978 (NGPA),[85] a complicated regulatory scheme under which deregulation of gas production will occur in stages.[86] The NGPA also provides that the NGA and the jurisdiction of the Federal Energy Regulatory Commission (FERC), the FPC's successor, does not apply to the first sales of deregulated gas or gas not dedicated to interstate commerce on the day before the enactment of the NGPA.[87]

B. Constitutionality of Ratable Take Orders

Last term, in *Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board of Mississippi*,[88] the Mississippi Supreme Court discussed the authority of the NGPA over recently deregulated gas. In *Transcontinental*, an interstate pipeline company, Transcontinental Gas Pipe Line Corporation (Transco), purchased high-cost natural gas[89] from owners and producers of six wells in a common pool.[90] Prior to 1982,

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[82] Taylor, *supra* note 75, at 100. The FPC's jurisdiction under the NGA applied "to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale . . ." but not to the "production or gathering of natural gas." 15 U.S.C. § 717(b)(1982). In Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), the United States Supreme Court held that FPC jurisdiction also applied to producers of interstate gas. *Id.* at 682-85.

[83] Taylor, *supra* note 75, at 101.

[84] *Id.*; Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 VA. L. REV. 63, 69-70, 87 (1982).

[85] 15 U.S.C. §§ 3301-3432 (1982).

[86] *See* Pierce, *supra* note 84, at 86, 89 (sequence of deregulation).

[87] Natural Gas Policy Act of 1978 § 601(a)(1)(A)-(B), 15 U.S.C. § 3431(a)(1)(A)-(B)(1982). The term "first sale" of wellhead gas is defined in 15 U.S.C. § 3301(21)(1982).

[88] 457 So. 2d 1298 (Miss. 1984), *rev'd*, 54 U.S.L.W. 4114 (U.S. Jan. 22, 1986).

[89] High-cost natural gas includes gas produced from geopressured brine, occluded gas produced from coal seams, gas produced from Devonian shale and gas from wells drilled after February 19, 1977, and producing from a depth of more than 15,000 feet. Natural Gas Policy Act of 1978 § 107(c), 15 U.S.C. § 3317(c)(1982). It accounts for only a small fraction of the aggregate gas supply. Pierce, *supra* note 84, at 87-88.

[90] *Transcontinental*, 457 So. 2d at 1305, 1307. By 1982, there were at least six wells producing from the Harper Sand Gas Pool in Marion County, Mississippi. Three, the Getty-Rogers Well, the Getty-Sipp Well and the Getty-Buckley Well, were operated by Getty Oil Company. One, the Tomlinson-Willoughby Well, was operated by Tomlinson

Transco took ratably[91] from the wells and purchased the gas of owners and producers who had no gas purchase agreement with Transco at the same price and under the same conditions as Transco purchased from the wells' operators (Getty Oil Company, Tomlinson Interests, Inc., and Florida Exploration Company) under their operating contracts.[92] Due to poor market conditions in 1982, however, Transco notified the non-contracting owners and producers in four of the wells that it would no longer purchase their gas unless they accepted a lower price.[93]

Coastal Exploration, Incorporated (Coastal), a non-contracting owner of small undivided interests in four wells,[94] rejected Transco's offer and petitioned the State Oil and Gas Board[95] to require Transco to purchase Coastal's share of gas from the Getty wells under the terms and conditions of Transco's contract with Getty.[96] After a hearing, the Board ordered Transco to comply with Rule 48 of the State Oil and Gas Board[97] and to purchase gas without discrimination in favor of one

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Interests, Inc. Two others, the Florida Exploration-Barnes Well and the Florida Exploration-Carlisle Well, were operated by the Florida Exploration Company. All of the wells were "high-cost wells," *i.e.*, they were drilled after 1977 and were producing from a depth of more than 15,000 feet. *Id.* at 1307; *see supra* note 89.

[91] *See supra* notes 75-76. For another definition of ratable take, see *infra* note 97.

[92] *Transcontinental*, 457 So. 2d at 1308. By 1982, Transco had approximately 35 gas purchase contracts with various owners and producers in the wells at prices ranging from $5.00 per million British thermal units (mmbtu) of gas to $9.054 per mmbtu. *Id.* at 1307-08. Getty's contract provided for a price of $7.907 per mmbtu; Tomlinson was receiving $6.511 per mmbtu and Florida Exploration was receiving $8.4066 per mmbtu. *Id.* at 1308.

[93] *Id.* at 1308-09. In the summer of 1982, Transco ceased to purchase the gas of non-contract producers in the Getty and Tomlinson wells unless they agreed to nominate a single seller's representative for each well, accepted a "market-out" clause and agreed to lower their price to the market price of $5.00 per mmbtu. *Id.* at 1309. This practice of refusing to buy from non-contracting producers was detailed in the Taylor article, *supra* note 75, at 90, 93.

Due to restrictive provisions in its contract with Florida Exploration, however, Transco continued to purchase non-contract producers' gas from the two Florida-operated wells on the same terms and conditions and at the same price that Transco purchased Florida Exploration's gas. *Id.*

[94] *Id.* at 1308. Coastal owned generally less than one percent in the units of the Getty-Rogers Well, the Getty-Sipp Well, the Tomlinson-Willoughby Well, and the Florida Exploration-Barnes Well. *Id.*

[95] *Id.* at 1309. Several other owners in the four wells joined Coastal as petitioners before the Board. *Id.* at 1305.

[96] Due to Transco's actions, the Getty and Tomlinson wells were cut back below their allowable rates, while the Florida Exploration wells continued to produce at their respective allowable rates. *Id.* at 1310. The result was unratable withdrawals of gas and drainage from the Getty and Tomlinson wells to the Florida-operated wells. *Id.*

[97] Rule 48 proscribing ratable take provides: "Each person now or hereafter engaged

owner, operator or producer against another in the common pool.[98] The circuit court affirmed.[99]

Transco's primary contentions on appeal were: (1) that the Natural Gas Act (NGA),[100] the Natural Gas Policy Act of 1978 (NGPA)[101] and the authority vested thereby with the Federal Energy Regulatory Commission (FERC) preempted the state's authority to make and enforce Rule 48;[102] (2) that the state did not have authority to enforce Rule 48 as interpreted by the Board's order because it created an impermissible burden on interstate commerce under the Commerce Clause;[103] (3) that the Oil and Gas Board had no authority under state law to adopt or enforce a ratable take rule;[104] and (4) that even if the Board could require ratable taking, it had no authority to regulate or proscribe price differentials.[105]

The Mississippi Supreme Court noted that the United States Supreme Court's decision in *Northern Natural Gas Co. v. State Corp. Commission of Kansas*[106] made it clear that, prior to 1978, FERC's authority under the NGA to regulate the sale and transportation of gas in

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in the business of purchasing oil or gas from owners, operators, or producers shall purchase without discrimination in favor of one owner, operator, or producer against another in the same common source of supply." MISS. STATE OIL AND GAS BOARD, STATUTES, RULES OF PROCEDURE, STATEWIDE RULES AND REGULATIONS 75(1970).

[98] *Transcontinental*, 457 So. 2d at 1311. Specifically, the Board ordered that if Transco chose to purchase gas from the pool, it had to do so ratably and without discrimination in favor of the operators, Getty and Tomlinson, against Coastal and two other owners. *Id.*

[99] *Id.* Transco appealed the Board's order to the Circuit Court of the First Judicial District of Hinds County, Mississippi, where the order was affirmed. *Id.*

[100] 15 U.S.C. §§ 717-717w (1982).

[101] 15 U.S.C. §§ 3301-3432 (1982).

[102] *Transcontinental*, 457 So. 2d at 1313.

[103] *Id.* at 1318.

[104] *Id.* at 1325.

[105] *Id.* at 1328. Transco made two additional federal law claims. First, it contended that Rule 48 was void for vagueness. *Id.* at 1323. Rejecting Transco's claim, the court held that the terms "ratable take," "purchase without discrimination" and "same common source of supply" were readily understandable. *Id.* at 1324. The court held that although the concepts were expressed in general language, that was not sufficient to render the rule impermissibly vague. *Id.*

Transco next argued that the Board's order was an arbitrary exercise of the state's police power which would result in an unconstitutional taking of Transco's property without compensation. *Id.* The court held that the order was not arbitrary, but rather was made to further the state's legitimate interest in protecting the correlative rights of owners in a common pool. Further, the court held that it was Transco's contract with Getty, not Rule 48, which effected a "taking" of Transco's property. *Id.* at 1324-25.

[106] 372 U.S. 84 (1963); *see supra* text accompanying notes 79-81.

interstate commerce was sufficient to preempt the state's authority to enforce Rule 48 and to render the Board's order unenforceable.[107] The court noted, however, that *Northern Natural* only applied to ratable take orders substantially affecting gas subject to FERC's jurisdiction and that, in 1978, FERC's authority over high-cost natural gas had been altered by the enactment of the NGPA.[108]

The NGPA primarily had effectively deregulated the wellhead sales of high-cost gas.[109] Secondly, the NGPA provided that the NGA and FERC's jurisdiction under the NGA never applied to the first sales of deregulated gas.[110] Thirdly, while FERC still had the authority to determine whether pipelines could pass wellhead prices to consumers, the NGPA had not given FERC jurisdiction over the wellhead first-sales of deregulated natural gas.[111] Concluding that both express and

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[107] *Trancontinental*, 457 So. 2d at 1314.

[108] *Id.* at 1315-16.

[109] *Id.* at 1316; *see* Natural Gas Policy Act of 1978 § 121(b), 15 U.S.C. § 3331(b)(1982)(elimination of price controls for high-cost natural gas). The gas Transco was purchasing was deregulated high-cost gas. *See supra* note 89.

[110] *Transcontinental*, 457 So. 2d at 1316. The court relied on § 601(a)(1) of the NGPA, which provides in pertinent part:

> (A) Natural Gas Not Committed or Dedicated—For purposes of section 1(b) of the Natural Gas Act, . . . the provisions of the Natural Gas Act and the jurisdiction of the Commission under such shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act solely by reason of any first sale of such natural gas.
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> (B) Committed or Dedicated Natural Gas— . . . [F]or purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act and which is—(i) high-cost natural gas. . . .

Natural Gas Policy Act of 1978 § 601(a)(1)(A)-(B), 15 U.S.C. § 3431(a)(1)(A)-(B)(1982).

The court held that since the NGA and FERC's jurisdiction under the NGA no longer encompassed deregulated gas and since FERC had no authority to regulate, directly or indirectly, the first sales of deregulated gas, *see supra* text accompanying note 75, then the decision of *Northern Natural* did not direct FERC's preemption of state authority. *Transcontinental*, 457 So. 2d at 1316-17.

[111] *Id.* at 1317. The court noted that under the NGPA, FERC still had the authority to determine whether a pipeline could pass wellhead prices through to consumers, but that this "pass through" could be denied only where the prices paid producers were excessive "due to fraud, abuse or similar grounds." *Id.* (citing Natural Gas Policy Act of 1978 § 601(c)(2), 15 U.S.C. § 3431(c)(2)(1982)).

Transco argued that this continuing, albeit altered, pass through approval authority was evidence of FERC's continuing jurisdiction over the wellhead sales. *Transcontinental*, 457 So. 2d at 1317. Rejecting Transco's argument, the court held that the NGPA's

implied federal jurisdiction and regulation had been withdrawn[112] and that Congress had not prohibited state regulation of deregulated gas,[113] the court held the state's authority to require the ratable taking of deregulated gas was not preempted.[114] Moreover, the court, applying the balancing of interests test announced in *Pike v. Bruce Church, Inc.*,[115] held that the state's enforcement of Rule 48 did not create an impermissible burden on interstate commerce.[116] In reaching this holding, the court first determined that the "legitimate local public interest" promoted by Rule 48 was fairness among the varying interests in a common source.[117]

The court next examined the extent of the burden imposed on interstate commerce by Rule 48. Transco argued that the principal burden imposed was higher prices to the ultimate consumers of natural gas.[118] Rejecting this argument, the court stated that not only was it

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pass through provisions did not give FERC authority to intervene when a pipeline, denied the ability to pass the wellhead prices through, sought to rescind its deal with its producers. *Id.*

[112] *Id.* The court, comparing Rule 48 with federal law, found no actual conflict and stated that nothing in federal law as modified by the NGPA left a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Id.* (quoting Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982)).

[113] *Transcontinental*, 457 So. 2d at 1318. While noting that a federal decision to forego regulation might imply a preemptive determination that the area is best left unregulated, *id.* at 1317, the court held that nothing in the terms and provisions of the NGPA prevented stated regulation of wellhead sales of deregulated gas. *Id.* Rather, the court held, the NGPA merely abrogated federal regulatory authority and left in effect the existing regulatory authority of the state. *Id.*

[114] *Id.* The court cautioned that its holding on the preemption issue was limited to the first sales of deregulated rather than regulated gas. *Id.*

[115] 397 U.S. 137 (1970). In *Pike*, the Supreme Court stated the following general rule for determining the validity of state statutes affecting interstate commerce:

> [W]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142.

[116] *Transcontinental*, 457 So. 2d at 1323.

[117] *Id.* at 1321. The court rejected Coastal's argument that conservation and the prevention of waste were implicit in Rule 48, concluding that waste would result from taking too much rather than from refusing to take ratably or otherwise. *Id.* at 1320.

[118] *Id.* at 1321. Transco also argued that the Board's order would require that more

well established that higher prices to consumers in another state did not render a state's regulation of commerce impermissible per se,[119] but also stated that Congress had expressly authorized such increases to consumers by enacting the NGPA.[120] Rather, the court noted that the burden involved was not one imposed on interstate commerce but was one imposed on Transco by its contract with Getty.[121]

In examining Transco's state law claims, the court noted that the Board's order had been construed to require Transco to purchase ratably and without discrimination in price.[122] Examining the Mississippi Oil and Conservation Act,[123] the court held that the Board had the authority to make and enforce a ratable take order such as Rule 48.[124] The court concluded, however, that nothing in the provisions or history of the Act gave the Board the authority to proscribe differentials in price.[125]

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natural gas be taken from Mississippi and less from Louisiana and Texas. The court noted that not only was there no evidence that Rule 48 would impermissibly discriminate against gas production in Louisiana and Texas, but also that both states had ratable take statutes in effect. *Id.* at 1321-22.

[119] *Id.* at 1321. The court noted that this proposition was established in decisions handed down prior to *Pike*. Although expressing concern over the authoritative effect of pre-*Pike* decisions, the court nevertheless assumed the premise was still good law. *Id.* at 1320.

[120] *Id.* at 1321. The court noted that Congress assumed consumer prices would increase under the NGPA and that one of the fundamental policy determinations underlying the Act was that all reasonable costs of natural gas production would be borne ultimately by the consumer. *Id.*

[121] *Id.* at 1322. The court noted that the only thing requiring Transco to purchase gas at all was its contract with Getty. Transco had voluntarily entered into the agreement with full knowledge of Rule 48 and the inequities the Rule was designed to prevent. *Id.* The problem, the court concluded, was not Rule 48 but Transco's failure to protect itself against a market glut. *Id.*

[122] *Id.* at 1328. While the Board did not specifically prohibit Transco's price discrimination, the court noted that everyone had construed the order as applying to price. *Id.*

[123] MISS. CODE ANN. §§ 53-1-1 to -201 (1972 & Supp. 1984).

[124] *Transcontinental*, 457 So. 2d at 1326-27. The court relied on MISS. CODE ANN. §§ 53-1-1, -17(c)(12), -17(c)(13)(1972 & Supp. 1983), as well as the Board's implied authority to reasonably carry out the specific mandates of the legislature in protecting the rights of owners in a common source. *Transcontinental*, 457 So. 2d at 1326.

[125] *Transcontinental*, 457 So. 2d at 1329. The court noted that since prices should be the product of an arms-length bargain and the marketplace, price regulation measures must be authorized in clear and unmistakable language. *Id.* The court noted that the Act not only failed to give the Board the authority to regulate prices, but it also failed to even mention the need to regulate wellhead sales prices. *Id.* Since the Board has only the authority vested in it by the legislature, the court held that the Board was without the authority to fix prices directly or "under the ruse of prohibiting discrimination." *Id.* at

Accordingly, the court held that if Transco took gas from the pool, Rule 48 required that it take or attempt to take ratably.[126] Transco was not required, however, to offer non-contracting owners the same price paid to Getty.[127] Rather, the court held, to comply with Rule 48, the pipeline must merely offer in good faith the non-contracting owners a price reasonable under existing market conditions.[128] An owner may reject the price and risk drainage. He would have no legal redress, however, simply because he failed to contract for a higher price when the market was more favorable.[129]

It should be noted that this case is presently on appeal to the United States Supreme Court.[130]

Cynthia C. Etheridge

[Editor's Note: As this issue went to press, the United States Supreme Court had just reversed the Mississippi court decision by holding that the enactment of the NGPA did not alter the *Northern Natural* decision; thus, a ratable take order was preempted. The Court held that Congress had intended for the area to be less regulated and had not intended to give the states the power to impose additional regulations that it had denied FERC. The majority opinion only discussed federal preemption and did not make a determination concerning the other issues raised in the Mississippi court. *Transcontinental Gas Pipe Line Corp. v. Mississippi State Oil & Gas Board*, 54 U.S.L.W. 4114, 4116-18 (U.S. Jan. 22, 1986).]

1328-29.

[126] *Id.* at 1330-31.

[127] *Id.* at 1331.

[128] *Id.* In emphasizing the need for reasonableness in the offer, the court noted that offering an owner a choice between a price substantially below the market, or other such unreasonable term, and drainage would not constitute ratable taking as required by Rule 48. *Id.*

[129] *Id.*

[130] *See* Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd., 105 S. Ct. 1840 (1985)(probable jurisdiction noted). Subsequently the Court has granted the Solicitor General's motion for leave to participate in oral argument and the Mississippi State Oil and Gas Board's motion for divided argument. Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd. of Miss., 105 S. Ct. 3495, 3495-96 (1985); *see also* Taylor, *supra* note 75, at 107 (prediction that *Transcontinental Gas* might be first test case to reach Supreme Court).

CIVIL PROCEDURE

During its 1984 term, the Mississippi Supreme Court handed down sixty-nine decisions affecting various areas of civil procedure. These areas included service of process,[1] indispensable and necessary parties,[2] pleadings,[3] affirmative defenses,[4] limitations of actions,[5] motion prac-

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[1] Covington v. Covington, 459 So. 2d 780, 781-82 (Miss. 1984)(in contempt proceeding where chancery court has continuing jurisdiction, notice that proceeding is pending may be made pursuant to MISS. R. CIV. P. 5 & 6; Boone v. George County Dep't of Pub. Welfare, 459 So. 2d 254, 257 (Miss. 1984)(motion to dismiss raising substantive objections is general appearance and cures defective service of process).

[2] Fairchild v. Keyes, 448 So. 2d 292, 294 (Miss. 1984)(corporation indispensible party in action seeking its dissolution); McCollum v. State Dep't of Pub. Welfare, 447 So. 2d 650, 653 (Miss. 1984)(where paternity was admitted, mother was necessary party in proceeding to determine visitation rights but not in proceeding to determine support).

[3] Mattina v. Rodolfich, 461 So. 2d 751, 753 (Miss. 1984)(issues not pleaded but tried by express or implied consent of parties are to be treated as though raised by pleadings); Southside, Inc. v. Clark, 460 So. 2d 113, 114 (Miss. 1984)(since demurrer tests sufficiency of declaration upon its face, court's consideration of depositions is improper); Reed v. State, 460 So. 2d 115, 119 (Miss. 1984)(where defendant fails to file verified answer, petition for forfeiture makes out prima facie case); Bourn v. Tomlinson Interest, Inc., 456 So. 2d 747, 749 (Miss. 1984)(liberal amendment policy of MISS. R. CIV. P. was not intended to allow party to escape summary judgment); Red Enterprises v. Peashooter, Inc., 455 So. 2d 793, 794-96 (Miss. 1984)(where amendment of defendant's answer to add affirmative defense was not unduly prejudicial, leave to amend should be liberally granted); Osborn v. Harrison, 447 So. 2d 122, 123 (Miss. 1984)(where removal of tax deed as cloud on title was sought, it was unnecessary for plaintiff to deraign title in initial complaint).

[4] Willis v. Marlar, 458 So. 2d 722, 724 (Miss. 1984)(defendant granted separate hearing on affirmative defense has burden of proof as to law and facts).

[5] Pittman v. Hodges, 462 So. 2d 330, 333 (Miss. 1984)(where injury was previously diagnosed as temporary, statute of limitations in medical malpractice action runs from discovery of permanent nature of injury); Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes Mfg. Co., 456 So. 2d 750, 753-54 (Miss. 1984)(action barred by statute of limitations as to subrogor is similarly barred as to subrogee); West End Corp. v. Royals, 450 So. 2d 420, 424-25 (Miss. 1984)(10-year statute of limitations for actions against builders inapplicable where builder is also owner; laches inapplicable where statute of limitation has not run); Larsen v. Kimble, 447 So. 2d 1278, 1283 (Miss. 1984)(claims existing prior to July 1, 1981, concerning estate of intestate, who died before such date and which are brought by legitimate daughter of intestate's illegitimate child, must be brought by July 1, 1984); Stevenson v. Daniels, 446 So. 2d 597, 598 (Miss. 1984)(motion by illegitimate to be declared heir at law of intestate parent made more than six years after child had reached age of majority not barred by statute of limitations); Vaughn v. State Farm Mut. Auto Ins. Co., 445 So. 2d 224, 226-27 (Miss. 1984)(statute of limitations governing action under uninsured motorist provision of automobile policy began to run when motorist was adjudged to be uninsured).

tice,[6] summary judgments,[7] default judgments and decrees pro confesso,[8] nonsuits,[9] voluntary dismissals,[10] discovery,[11] juries,[12] evidence,[13]

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[6] Moore v. Moore, 451 So. 2d 226, 227 (Miss. 1984)(under MISS. R. CIV. P. 6(d) & 81, five days' notice is sufficient for hearing on motion for citation for contempt for failure to pay child support).

[7] Smith v. First Fed. Sav. & Loan Ass'n, 460 So. 2d 786, 792 (Miss. 1984)(to avoid summary judgment, party must produce significant probative evidence demonstrating existence of triable issue of fact); Pearl River County Bd. of Supervisors v. South East Collections Agency, 459 So. 2d 785, 787 (Miss. 1984)(summary judgment improper where there is genuine issue of material fact); Dethlefs v. Beau Maison Dev. Corp., 458 So. 2d 714, 716-17 (Miss. 1984)(summary judgment proper only where there is no issue of material fact); Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984)(ambiguity in contract raised question of material fact precluding summary judgment); Griffin v. Ware, 457 So. 2d 936, 938 (Miss. 1984)(trial court, where movant presents affidavit, may treat 12(b)(6) motion as one for summary judgment and consider matters outside pleadings when ruling on motion); Biggers v. Fox, 456 So. 2d 761, 763 (Miss. 1984)(affidavit failing to allege personal knowledge of facts necessary to constitute accord and satisfaction was insufficient to support summary judgment); Holland v. Kennedy, 454 So. 2d 1305, 1305-06 (Miss. 1984)(where original declaration was filed prior to effective date of MISS. R. CIV. P. 56, amended declaration filed after that date cannot be disposed of on motion for summary judgment); Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055, 1062 (Miss. 1984)(trial court erred in granting summary judgment on all claims where plaintiff lacked standing to sue on only some claims). Plaintiffs in *Vickers* lacked standing under Bruno v. Southeastern Serv. Inc., 385 So. 2d 620 (Miss. 1980). *Bruno* requires that where the wrong is suffered by the corporation, a stockholder may not sue in his individual capacity to redress that wrong. *Vickers*, 558 So. 2d at 1061. Thus, where plaintiff's complaint stated wrongs personally actionable by him along with wrongs which could be brought only by the corporation, summary judgment was appropriate only on the latter set of claims. *Id.* at 1064.

[8] International Paper Co. v. Basila, 460 So. 2d 1202, 1204 (Miss. 1984)(on motion to set aside decree pro confesso, trial court should consider whether there was bona fide excuse for failure to answer timely, whether defaulting party had colorable defense on merits, and whether non-offending party would be prejudiced by delay if decree was set aside); First Miss. Nat'l Bank v. KLH Indus., 457 So. 2d 1333, 1338-39 (Miss. 1984)(garnishee may suspend enforcement of default judgment by filing of sworn declaration prior to completion of execution); Stringfellow v. Stringfellow, 451 So. 2d 219, 222 (Miss. 1984)(attorney's incompetence not grounds for relief under MISS. R. CIV. P. 60(b)(2)); Donaldson v. Pontotoc County Welfare Dep't, 445 So. 2d 1377, 1378-79 (Miss. 1984)(illiteracy and ignorance of meaning of service of process not grounds for relief under MISS. R. CIV. P. 60(b)(2)).

[9] Celotex v. J.B. Womack Constr. Co., 455 So. 2d 1314, 1315-16 (Miss. 1984)(prior to adoption of MISS. R. CIV. P., plaintiff had absolute right to nonsuit at any time before retirement of jury or decision on merits, subject to any substantive right of defendant acquired during litigation, denial of which would be unduly prejudicial).

[10] State *ex rel* Pittman v. Griffin, 450 So. 2d 426, 431 (Miss. 1984)(MISS. R. CIV. P. 41(a)(2) does not prevent attorney general as opposed to other litigants from proceeding with case where his duty so requires).

[11] Kilpatrick v. Mississippi Baptist Medical Center, 461 So. 2d 765, 767 (Miss.

sequestration of witnesses,[14] judgments notwithstanding verdict and directed verdicts,[15] additurs,[16] writs of execution[17] and prohibition,[18] appeals,[19] due process,[20] long-arm jurisdiction,[21] sovereign immunity,[22]

1984)(dismissal with prejudice proper sanction for failure to comply with discovery order).

[12] Isaac v. McMorris, 461 So. 2d 714, 716 (Miss. 1984)(party may not withdraw request for trial by jury without consent or stipulations of all parties); Grimsley v. Tyner, 454 So. 2d 482, 485 (Miss. 1984)(reversible error for trial judge to require fatigued jury to deliberate at late hour).

[13] Pittman v. Hodges, 462 So. 2d 330, 334 (Miss. 1984)(expert medical testimony must be taken as whole in ascertaining whether it is based on probabilities or possibilities); Harris v. Buxton T.V., Inc., 460 So. 2d 828, 831-33 (Miss. 1984)(where finding of liability against party would give rise to potential claim for indemnity against witness, that witness is sufficiently identified with party under MISS. R. CIV. P. 43(b)(3) to be called by adverse party and examined by leading question); Cain v. Mid-South Pump Co., 458 So. 2d 1048, 1050 (Miss. 1984)(witness may qualify as expert in his field by showing of sufficient experience in his particular field or trade despite lack of formal education); Stong v. Freeman Truck Line, Inc., 456 So. 2d 698, 712-13 (Miss. 1984)(results of blood alcohol test inadmissable in civil trial); Cutchens v. Bryant, 449 So. 2d 231, 232 (Miss. 1984)(decision by zoning board on opposed petition for reclassification of property should be based on evidence presented at full evidentiary hearing); Patterson v. Merchants Truck Line, Inc., 448 So. 2d 288, 292 (Miss. 1984)(where employee is held liable for misappropriating funds, employer must prove by clear and convincing evidence that employee received funds).

[14] Bethune v. Turner, 461 So. 2d 771, 773 (Miss. 1984)(before party is prevented from testifying for violation of rule of sequestration he must be given alternative of testifying first or leaving courtroom).

[15] Mattina v. Rodolfich, 461 So. 2d 751, 753 (Miss. 1984)(motion for directed verdict should be denied where close questions of fact are involved); Stubblefield v. Jesco, Inc., 458 So. 2d 699, 705-06 (Miss. 1984)(standard for granting j.n.o.v. is whether, when all evidence and inferences are considered in favor of non-movant, reasonable men could not have arrived at contrary verdict)(follows standard of Justice Robertson's concurring opinion in Jesco v. Whitehead, 451 So. 2d 706, 713 (1984)); Litton Systems, Inc., v. Enochs, 449 So. 2d 1213, 1215 (Miss. 1984)(on motion for directed verdict or j.n.o.v., court should consider all evidence supporting non-moving party, together with reasonable inferences therefrom, and should disregard movant's conflicting evidence).

[16] City of Jackson v. Ainsworth, 461 So. 2d 325, 329 (Miss. 1984)(additur proper where jury fails to award properly compensable elements of damages).

[17] Bonds v. Bonds, 453 So. 2d 1020, 1021-22 (Miss. 1984)(absent special circumstances, sheriff failing to return writ of execution by the return date is subject to liability under MISS. CODE ANN. § 19-25-41 (1972)).

[18] Crocker v. Commercial Nat'l Bank & Trust Co., 455 So. 2d 1309, 1311 (Miss. 1984)(under MISS. R. CIV. P. 47 prohibition not available upon failure of chancellor to rule on non-appealable motion to transfer to circuit court); State *ex rel* Pittman v. Griffin, 450 So. 2d 426, 430 (Miss. 1984)(writ of prohibition issued to prevent contempt proceeding against attorney general).

[19] Pittman v. Hodges, 462 So. 2d 330, 335-36 (Miss. 1984)(absent manifest injustice, objection to jury instruction is waived if not raised at trial); First Miss. Nat'l Bank v. S

& K Enter., 460 So. 2d 839, 841 (Miss. 1984)(timeliness of appeal from order dismissing party from foreclosure proceeding for lack of in personam jurisdiction is determined from entry of decree ordering sale; failure of party to pursue interlocutory appeal does not preclude appeal from final order); Old Sec. Casualty Ins. Co. v. Clemmer, 458 So. 2d 732, 733 (Miss. 1984)(statutory penalty for unsuccessful appeal applicable only to unconditional affirmance); Flake v. Randle Reed Trucking Co., 458 So. 2d 223, 224 (Miss. 1984)(findings of fact by Workers' Compensation Commission entitled to affirmance unless clearly erroneous); Dethlefs v. Beau Maison Dev. Corp., 458 So. 2d 714, 717 (Miss. 1984)(failure of appellee to file brief amounts to confession of error); City of Mound Bayou v. Roy Collins Constr. Co., 457 So. 2d 337, 340-41 (Miss. 1984)(incorporated municipality exempt from filing appeal bond due to public policy; MISS. R. CIV. P. 48 does not abrogate statutory exemption found at MISS. CODE ANN. § 11-51-101 (1972)); Mississippi State Personnel Bd. v. Armstrong, 454 So. 2d 912, 915 (Miss. 1984)(since statutory bond requirements are jurisdictional, failure to file appeal bond within statutory period defeats jurisdiction of circuit court); Roberts v. Mississippi Republican Party State Exec. Comm., 454 So. 2d 1309, 1310 (Miss. 1984)(grant of petition for rehearing contingent on posting security bond); Clark v. Mid-State Homes, Inc., 452 So. 2d 855, 856 (Miss. 1984)(on bill of review, performance bond not necessary where stay of superseding judgment is not sought); Jesco, Inc. v. Whitehead, 451 So. 2d 706, 710 (Miss. 1984)(appellant not required to provide his own jury instruction where his specific objection to appellee's instruction was overruled); Brown v. Brown, 450 So. 2d 1083, 1084 (Miss. 1984)(in divorce action, wife's appeal on merits dismissed where husband's answer showed divorce proceeding pending in Illinois court); Tuggle v. Williamson, 450 So. 2d 93, 95 (Miss. 1984)(appeal of order enforcing sale of property must be within 45 days of decree); Ferguson v. Watkins, 448 So. 2d 271, 274-75 (Miss. 1984)(though appellees did not cross-appeal, they were entitled to argue for sustainment of judgment and rejection of appeal); Collins v. North Miss. Sav. & Loan Ass'n, 445 So. 2d 828, 831-32 (Miss. 1984)(no cause of action for allegedly frivolous or bad-faith appeal before decision on appeal is rendered); Gibson Prod. Co. v. Martin, 445 So. 2d 1329, 1329 (Miss. 1984)(statutory damages must be assessed upon unsuccessful appeal notwithstanding satisfaction of judgment prior to perfection of appeal).

[20] Administrators of the Tulane Educ. Fund v. Cooley, 462 So. 2d 696, 704-05 (Miss. 1984)(where defendant avails itself of privileges of conducting continuous and purposeful activities within the state, it may, consistent with due process, be subjected to attachment jurisdiction by state's courts); First Miss. Nat'l Bank v. S & K Enter., 460 So. 2d 839, 842-43 (Miss. 1984)(where nonresident has purposefully availed himself of privilege of doing business within state, due process not violated by subjecting him to personal jurisdiction); McCollum v. State Dep't of Pub. Welfare, 447 So. 2d 650, 653 (Miss. 1984)(mother must be made party to decree affecting visitation rights); Mississippi Bank v. Kelly, 445 So. 2d 849, 851 (Miss. 1984)(contempt citation entered against bank without affording bank notice and hearing violative of due process).

[21] First Miss. Nat'l Bank v. S & K Enter., 460 So. 2d 839, 842-43 (Miss. 1984)(execution of personal loan guaranty instrument by nonresident while out of state, and acceptance of same instrument within state, brings nonresident within state's long-arm jurisdiction).

[22] Hudson v. Rausa, 462 So. 2d 689, 696 (Miss. 1984)(medical malpractice claim against State Department of Health doctor and nurse barred by qualified public official immunity); White v. City of Tupelo, 462 So. 2d 707, 709-10 (Miss. 1984)(judicial sovereign immunity bars suit against city and fire-chief who was not personally involved in

certification,[23] forfeiture,[24] and the scope of the Mississippi Rules of Civil Procedure.[25] The Mississippi Legislature also passed several statutes affecting civil procedure.[26] Those cases and statutes which warrant in-depth analysis are discussed below.

I. Limitation of Actions

Among the 1984 decisions addressing limitation of actions,[27] *West End Corp. v. Royals*,[28] *Indiana Lumbermen's Mutual Insurance Co. v. Curtis Mathes Manufacturing Co.*,[29] and *Pittman v. Hodges*[30] resolve issues new to Mississippi law and thus warrant discussion.

In *West End Corp.*, the plaintiff-homeowner, Royals,[31] recovered a judgment against defendant, Universal Investment Corporation, the owner and developer of the subdivision in which Royals lived,[32] and co-defendant West End Corporation, the developer of an adjacent subdi-

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accident between fire truck and private citizen); Mississippi State Dep't of Pub. Welfare v. Howie, 449 So. 2d 772, 777 (Miss. 1984)(department waived sovereign immunity by entering into contract under auspices of legislature); McGoldrick Oil Co. v. Greene County, 446 So. 2d 594, 595 (Miss. 1984)(sovereign immunity applicable to actions accruing prior to July 1, 1984). For a discussion of legislative developments in sovereign immunity, *see infra* notes 93-101 and accompanying text.

[23] Jones v. Harris, 460 So. 2d 120, 122 (Miss. 1984)(question assuming unconstitutionality of state statute improperly certified where statute had not been declared unconstitutional by court of competent jurisdiction).

[24] Reed v. State, 460 So. 2d 115, 118 (Miss. 1984)(in forfeiture proceeding, state has burden of proving by preponderance of evidence that articles to be forfeited had been or were to be used in connection with unlawful activity; such connection may be inferred from circumstantial evidence).

[25] First Miss. Nat'l Bank v. KLH Indus., Inc., 457 So. 2d 1333, 1337-38 (Miss. 1984)(rules applicable to garnishment procedure are supplied by existing statutes, supplemented by Miss. R. Civ. P.); Holland v. Kennedy, 454 So. 2d 1305, 1305-06 (Miss. 1984)(where amended declaration related back to filing date of original petitions which predated adoption of Miss. R. Civ. P., summary judgment provisions of Rule 56 were unavailable); Edwards v. James, 453 So. 2d 684, 685 (Miss. 1984)(Miss. R. Civ. P. 81(d) & 6(d) required that party seeking modification of child support decree give other party five days' notice of hearing); Moore v. Moore, 451 So. 2d 226, 227 (Miss. 1984)(contempt proceedings for failure to pay child support subject to Miss. R. Civ. P. 6(d)); State *ex rel* Pittman v. Griffin, 450 So. 2d 426, 431 (Miss. 1984)(Rule 41(a)(2) interpreted not to prevent attorney general from proceeding with an action on behalf of state).

[26] *See infra* notes 80-101 and accompanying text.

[27] *See supra* note 5.

[28] 450 So. 2d 420 (Miss. 1984).

[29] 456 So. 2d 750 (Miss. 1984).

[30] 462 So. 2d 330 (Miss. 1984).

[31] 450 So. 2d at 423. Royals purchased his home in February, 1974. *Id.*

[32] *Id.*

vision.[33] Plaintiff complained that flood damage to his home was caused by the negligent design and maintenance of drainage systems serving the surrounding property.[34] The drainage systems of both subdivisions were linked and had been designed by the same engineer.[35] On appeal, the defendant developers contended that Royals' action was barred by either the ten-year statute of limitation in section 15-1-41 of the Mississippi Code[36] or the doctrine of laches.[37]

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[33] *Id.*

[34] *Id.* Royals' home was flooded on numerous occasions by the overflow of a drainage ditch adjoining his property. *Id.* The trial court found that the flooding resulted from two factors: defective construction of two junction boxes in the system built by Universal which serviced Royals' subdivision and increased surface water concentration in the drainage system caused by the building of an adjacent subdivision. *Id.*

[35] *Id.*

[36] *Id.* at 423. MISS. CODE ANN. § 15-1-41 (Supp. 1984) provides as follows:

> No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property . . . against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than ten (10) years after the written acceptance or actual occupancy or use whichever occurs first, of such improvement by the owner thereof. This limitation shall not apply to any person, firm or corporation in actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement causes injury.

MISS. CODE ANN. § 15-1-41 (Supp. 1984). Universal contended that it had lost possession and control of the drainage system no later than March 22, 1967. *West End Corp.*, 450 So. 2d at 423. Since Royals' action had not been filed until Nov. 22, 1977, and since Universal had not been joined as a party defendant until July, 1980, Universal reasoned that the 10-year limitation had expired, thus barring the suit. *Id.* In 1967, the drainage system had passed to the City of Hattiesburg for maintenance; however, the portion at issue in Royals' action had not, by the time of the trial, been accepted by the city. *Id.* at 424.

[37] 450 So. 2d at 425. The equitable doctrine of laches has been described as follows:

> The *doctrine of laches*, although resembling limitations, is not based upon, nor bound by, any express statute of limitations. It is a *rule peculiar to* and inherent in *courts of equity*, and it applies where it would be practically unjust to give a remedy, either because the appellant has by his conduct done that which might be fairly regarded as equivalent to a waiver of his remedy, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterwards asserted. A long or protracted delay in the prosecution of rights is presumed to have produced the situation last mentioned and equity looks with so little favor upon such prosecutions that it will not entertain them, although no express statute of limitations is available,—unless facts are shown which will rebut the presumption of

Rejecting these arguments, the Mississippi Supreme Court observed that the limitation period of section 15-1-41 was intended to protect builders who had relinquished access to and control of improvements to real property.[38] Since the statute specifically denied owners the protection of the ten-year limitation,[39] it did not bar the action against Universal who as both builder and owner continued to have access to and control over the property.[40] The court also held that since the action was not barred by an applicable statute of limitations, the doctrine of laches was inapposite.[41]

In *Indiana Lumbermen's Mutual Insurance Co. v. Curtis Mathes Manufacturing Co.*,[42] the supreme court resolved the issue of when a statutory limitation period commences against a subrogee. On December 1, 1976, the insureds of the plaintiff, Indiana Lumbermen's Insurance Company (ILM), suffered damage to their house in a fire allegedly caused by a defective television set manufactured by defendant Curtis Mathes and repaired by co-defendant Bill Huff.[43] On October 31, 1977, ILM effected contractual subrogation with its insured.[44] On May 4, 1983, ILM commenced the instant action against Curtis Mathes and Huff.[45] Before trial, Huff interposed as an affirmative defense the six-year statute of limitations of section 15-1-49 of the Mississippi

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injustice arising out of the apparently undue delay, or which will excuse the same.

Vanlandinghorn v. Meridian Creek Drainage Dist., 191 Miss. 345, 351-52, 2 So. 2d 591, 592 (1941)(quoting V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 33).

[38] 450 So. 2d at 424. *See also* Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 673 (Miss. 1983)(claim against home builder by either original or subsequent purchaser barred after 10 years); Anderson v. Fred Wagner and Roy Anderson Jr., Inc., 402 So. 2d 320, 324 (Miss. 1981)(MISS. CODE ANN. § 15-1-41 may be constitutionally applied to bar suit against architect and contractor of building).

[39] 450 So. 2d at 424. *See also* DeVille Furniture Co. v. Jesco, Inc., 423 So. 2d 1337, 1341 (Miss. 1982)(10-year limitation provision applicable to owner's action against builder, architect and subcontractors).

[40] 450 So.2d at 424. The court reasoned that since the builder was also the owner and thus had the same access to and control of the defective condition, the "dichotomy" of § 15-1-41 collapsed. *Id.*

[41] *Id.* at 425; *cf.* Bolden v. Gatewood, 250 Miss. 93, 119, 164 So. 2d 721, 732-33 (1964)(mere delay short of statutory period of limitation does not bar recovery; laches, in legal sense, is not mere delay, but delay that results in injustice or disadvantage or both); Sojourner v. Sojourner, 247 Miss. 342, 352-53, 156 So. 2d 579, 580 (1963)(no period of time short of statute of limitations can support laches as equitable bar to suit).

[42] 456 So. 2d 750, 754 (Miss. 1984).

[43] *Id.* at 753.

[44] *Id.*

[45] *Id.*

Code[46] and was granted judgment on the pleadings.[47]

On appeal, ILM maintained that its cause of action accrued upon the effective date of subrogation, and that the instant action, having been commenced within six years of subrogation, was therefore timely.[48] The court disagreed, holding that since ILM's rights were limited by those of its subrogors,[49] and since an action by these subrogors

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[46] *Id.* at 752. *See* MISS. CODE ANN. § 15-1-49 (1972)(six-year limitation of action to those actions not otherwise provided for). Appeal on the motion dismissing only one defendant was allowed under MISS. R. CIV. P. 54(b). 450 So. 2d at 752. The supreme court approved separate consideration of the two defendants because the claim against Huff was negligent repair and the claim against Curtis Mathes was an ordinary products liability action. *Id.* at 753. Moreover, since the trial court had taken no final action on Curtis Mathes' affirmative defense that the claim was barred, Curtis Mathes was not properly before the supreme court. *Id.* at 755. *See also* Moby v. Magnovox Co., 460 F. Supp. 47, 49-50 (N.D. Miss. 1978)(§ 15-1-49 applies to negligence and strict liability claims in products action against a television manufacturer and begins to run on date that defect is discovered).

[47] 456 So. 2d at 752. Huff moved for and was granted judgment on the pleadings pursuant to MISS. R. CIV. P. 12(c). 456 So. 2d at 752. No such motion was made or judgment entered for Curtis Mathes. *See id.* at 752-53. Nevertheless, the trial court entered a final, appealable judgment for Huff only pursuant to MISS. R. CIV. P. 54(b). 456 So. 2d at 752. Curtis Mathes contended that the trial judge had abused his discretion by entering a final judgment for one defendant among multiple defendants. 456 So. 2d at 752. The supreme court observed that the final judgment may be entered for fewer than all of the multiple defendants under MISS. R. CIV. P. 54(b) "upon an expressed determination that there is no just reason for delay and upon an expressed direction for entry of judgment." 450 So. 2d at 752 (quoting Rule 54(b) which is identical in its provisions to FED. R. CIV. P. 54(b)). *See generally* C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2655 (1983)(discussing requirements for judgment pursuant to FED. R. CIV. P. 54(b)). A Rule 54(b) judgment is subject to review only for abuse of discretion. 456 So. 2d at 753. *See* C. WRIGHT, A. MILLER & M. KANE, *supra*, § 2655, at 43 n.10. Moreover, the court held, due consideration must be given to the policy argument that the Rule 54(b) authority "should be exercised cautiously in the interest of sound judicial administration in order to preserve the established judicial policy against piecemeal appeals." 456 So. 2d at 752-53. *See also* Curtiss-Wright Corporation v. General Electric Co., 446 U.S. 1, 5 (1980)(essential inquiry focuses upon sound judicial administration); C. WRIGHT, A. MILLER & M. KANE, *supra*, § 2654 at 37 (Rule 54(b) balances problem of more than one appeal in single action with need to make review available in multiple-party or multiple-claim situations at convenience of litigants). Since the claims against Huff were grounded upon negligent repair and were thus distinguishable from the products liability claim against Curtis Mathes, the supreme court concluded that the trial judge had not abused his Rule 54(b) discretion. 456 So. 2d at 753.

[48] 456 So. 2d at 753.

[49] *Id.* at 754. *See also* First Nat'l Bank v. Huff, 441 So. 2d 1317, 1320 (Miss. 1983)(subrogee is substituted in the place of subrogor and obtains same rights); Murray v. Payne, 437 So. 2d 47, 52 (Miss. 1983)(upon payment, surety has equitable right of subrogation to assert rights of creditor against debtor-principal). The court observed that the physical instrument of subrogation was the functional equivalent of an assign-

would have been time barred, ILM's action was untimely.[50] Furthermore the court held that Rule 17(b) of the Mississippi Rules of Civil Procedure,[51] which prevented ILM from prosecuting the action in its own name prior to subrogation, neither created a new cause of action nor affected the running of the statute of limitations and thus required no different result.[52]

The Mississippi Supreme Court decided in *Pittman v. Hodges*[53] that the two-year statute of limitations on medical malpractice[54] does not begin to run until the plaintiff can discover the alleged act or omission by the exercise of reasonable diligence.[55] After removing two wisdom teeth from the mouth of the plaintiff's decedent, defendant informed his patient that resulting numbness in the lip could routinely last as long as six months to a year;[56] in fact, the numbness was due to permanent nerve damage. The plaintiff filed her malpractice suit two years and seven days after the decedent's last visit with the defendant dentist.[57] At trial on appeal, the defendant urged that the statute should begin to run from the date that the patient-decedent first complained of the numbness.[58] The court disagreed and stated that since

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ment, 456 So. 2d at 754. As an assignee, ILM could possess no greater rights than its assignor. *Id.; see also* Smith v. Copiah County, 252 Miss. 838, 844, 100 So. 2d 614, 616 (Miss. 1958)(assignee rights could "rise no higher" than those of assignor).

[50] 456 So. 2d at 754.

[51] MISS. R. CIV. P. 17(b) provides as follows:

> In subrogation cases, regardless of whether subrogation has occurred by operation of the law, assignment, loan receipt, or otherwise, if the subrogor no longer has a pecuniary interest in the claim the action shall be brought in the name of the subrogee. If the subrogor still has a pecuniary interest in the claim the action shall be brought in the names of the subrogor and the subrogee.

[52] 456 So. 2d at 755. The court held that Rule 17(b) "does not create new causes of action [and thus] does not affect statutes dealing with limitation of actions." *Id.*

[53] 462 So. 2d 330 (Miss. 1984).

[54] MISS. CODE ANN. § 15-1-36 (Supp. 1984).

[55] 462 So. 2d at 332-33.

[56] *Id.* at 332.

[57] *Id.* at 331.

[58] *Id.* at 333. Defendant claimed that Tribou v. Gunn, 410 So. 2d 378 (Miss. 1982), had interpreted the statute as starting to run when the plaintiff's decedent first discovered the numbness. 462 So. 2d at 333. In *Tribou*, the plaintiff was examined by the defendant physician concerning a lump in her breast. *Tribou*, 410 So. 2d at 379. A pap smear, performed two months earlier by another physician, suggested a malignancy. The plaintiff took the pap smear to the defendant in January, 1977, but the defendant said plaintiff did not have cancer. *Id.* On May 12, 1978, the defendant, through a biopsy, discovered that the tumor was malignant and performed a radical mastectomy. *Id.* The plaintiff brought suit on March 19, 1980. *Id.* at 378. The court held that the suit was not barred by the statute of limitations, since the plaintiff sued within two years of the bi-

the defendant had informed the decedent that numbness was to be expected and would last for some time, there was no way for the permanent nature of the numbness to be discovered until the temporary period described by the defendant had passed.[59] It would appear then that treating physicians cannot in effect shorten the statute of limitations by representing to the patient that the problem complained of is merely temporary, since such representation delays the time for discovery of the injury.

II. Due Process

In *Administrators of The Tulane Education Fund v. Cooley*,[60] the Mississippi Supreme Court applied recent United States Supreme Court interpretations of the due process clause[61] to define the scope of amenability to attachment of a nonresident defendant's property within the state under Mississippi's chancery procedure.[62]

In the instant case, plaintiff Cooley instituted a wrongful death action against the Administrators of the Tulane Education Fund (Tulane),[63] a nonresident defendant, by attaching certain property it held within the state.[64] Tulane resisted,[65] maintaining that a Mississippi

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opsy which resulted in the mastectomy. *Id.* at 379. The court stated that there was nothing to indicate that she could have discovered her cancer prior to that date by exercise of reasonable diligence. *Id.*

[59] 462 So. 2d at 333. The decision is consistent with other Mississippi decisions concerning statutes of limitations which hold that the focus should be on when the plaintiff could have discovered the injury by the exercise of reasonable care. *See, e.g.*, Struthers-Wells Gulfport, Inc. v. Bradford, 304 So. 2d 645, 649 (Miss. 1974)(workers' compensation statute of limitations did not begin to run against claimant bitten by spider until it could be discovered through reasonable care and diligence that compensable injury had occurred).

[60] 462 So. 2d 696 (Miss. 1984).

[61] *See infra* notes 69-77 and accompanying text.

[62] 462 So. 2d at 704. The Mississippi attachment in chancery procedures are set forth in Miss. Code Ann. §§ 11-31-1 to -11 (1972 & Supp. 1984). This procedure provides for the attachment of the property of a "non-resident, absent or absconding debtor." Miss. Code Ann. § 11-31-1 (1972).

[63] 462 So. 2d at 698. The Administrators of the Tulane Educational Fund, A Louisiana Corporation, or Tulane University, is a private non-sectarian university in Louisiana. *Id.* at 699.

[64] *Id.* at 698. The attached property included a sum owed to Tulane University arising out of an intercollegiate football contest and a debt owed to Tulane University by virtue of unpaid medical care under an insurance policy purchased by a benefit trust operated by the employer of plaintiff's decedent. *Id.*

[65] Tulane also maintained that the chancery court lacked subject matter jurisdiction. Tulane reasoned that since Cooley's claim was predicated upon conduct occurring

chancery court could not, consistent with due process, assert judicial jurisdiction[66] under the attachment statutes.[67] On interlocutory appeal by Tulane from the chancery court's denial of its motion to dismiss, the Mississippi Supreme Court found Tulane to have sufficient minimum contacts with Mississippi to make its property within the state constitutionally amenable to attachment.[68]

Under the early power or territorial theory of jurisdiction, recognized in *Harris v. Balk*,[69] a court could exercise in rem and quasi-in-rem, or attachment jurisdiction, over the property of a nonresident solely on the basis of the presence of such property within the forum.[70] The minimum contacts doctrine applied only to the exercise of in personam jurisdiction over a nonresident, under *International Shoe Co. v. Washington*[71] and its progeny.[72] The minimum contacts doctrine was

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in Louisiana, Louisiana law supplied the substantive law governing the action. Tulane maintained that Louisiana's requirement that such claims be submitted to a medical review panel defeated the Mississippi court's subject matter jurisdiction. 462 So. 2d at 701. While pretermitting the issue of choice of law, the supreme court rejected this contention, observing that Louisiana had no authority to limit the subject matter jurisdiction of Mississippi courts. *Id.; see also* Crider v. Zurich Ins. Co., 380 U.S. 39, 43 (1965)(construction of Georgia Workers' Compensation Act as exclusively within jurisdiction of Georgia Compensation Board did not prevent Alabama court from entertaining action thereon); Tennessee Coal, Iron & Railroad Co. v. George, 233 U.S. 354, 361 (1914)(statutory remedy specifying jurisdiction may be applied in forum other than one which is specified). *Cf.* Carroll v. Lanza, 349 U.S. 408, 413-14 (1955)(full faith and credit to statute of sister state not constitutionally mandated).

[66] The court defined judical jurisdiction as an "umbrella term that includes the familiar in personam jurisdiction, in rem jurisdiction and quasi-in rem jurisdiction." 462 So. 2d at 700 n.4 (citing Penrod Drilling Co. v. Bounds, 433 So. 2d 916, 925 n.3 (Miss. 1983)(Robertson, J., concurring)).

[67] 462 So. 2d at 700.

[68] *Id.* at 705.

[69] 198 U.S. 215 (1905).

[70] 198 U.S. at 222; *see also* McDonald v. Mabee, 243 U.S. 90, 91 (1917)(basis of jurisdiction is physical power); Pennoyer v. Neff, 95 U.S. 714, 722 (1878)(exclusive jurisdiction and sovereignty over persons and property within its territory belongs to each state); Grace v. McArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959)(jurisdiction over defendant upheld where conferred by service upon defendant in airplane flying over forum); *cf.* Milliken v. Meyer, 311 U.S. 457, 463 (1940)(domicile sufficient presence within forum to confer in personam jurisdiction. *But cf.* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960, 965 (1957)(California court has jurisdiction over intangible property deemed to be located in New York based on totality of contacts).

[71] 326 U.S. 310 (1945). The court in *International Shoe Co.* stated that to subject a defendant to a judgment *in personam* due process demands he have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316.

[72] *See, e.g.*, Keeton v. Hustler Magazine, Inc., 104 S. Ct. 1473, 1478 (1984)(publisher

extended to in rem actions by the United States Supreme Court in *Shaffer v. Heitner*.[73] Under *Shaffer*, for a court to exercise quasi-in-rem or attachment jurisdiction over a nonresident's property present in the forum but unrelated to the cause of action,[74] the nonresident must have sufficient contacts with the forum and the litigation so as not to offend "traditional notions of fair play and substantial justice."[75] *Shaffer* was refined in *Rush v. Savchuk*[76] in which the Supreme Court held unconstitutional the attachment of an insurer's obligation to defend a nonresident insured, where the essence of the underlying claim was against the insured and where the insured was not otherwise amenable to suit in the forum.[77]

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distributing magazine in forum subject to in personam jurisdiction); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (under due process analysis foreseeability means that defendant's conduct and connection with forum state are such that he should anticipate defending suit there); Kulko v. California Superior Court, 436 U.S. 84, 94 (1978)(father's consent to daughter living with mother in forum state insufficient contact for in personam jurisdiction); Hanson v. Denckla, 357 U.S. 235, 253 (1958)(due process requires that defendant purposefully avail itself of the privilege of conducting activities within the forum state). *See generally* Note, *Constitutional Law—Jurisdiction—To be Subject to Forum State's Personal Jurisdiction Foreign Corporation Must Reasonably Expect to Defend Suit*, 51 MISS. L.J. 121 (1980)(discussion of *World-Wide Volkswagen*).

[73] 433 U.S. 186 (1977).

[74] *Id.* at 208-09. The *Shaffer* Court distinguished actions where the res is related to the cause of action from those unrelated to it. *Id.* at 207-08. As the former typically included traditional in rem and quasi-in-rem actions, the presence of property within the forum is usually sufficient for jurisdiction. *Id.* at 208. In actions unrelated to the property, as where a nonresident's property is seized for the purpose of acquiring jurisdiction otherwise unavailable, the mere presence of the property is insufficient for maintenance of jurisdiction. *Id.* at 209. In such actions, the nonresident must have minimum contacts with the forum state to support an exercise of jurisdiction. *Id.* at 212.

[75] *Id.*

[76] 444 U.S. 320 (1980).

[77] *Id.* at 327-33. The conflict in *Rush* arose from a concept of jurisdiction established by the New York Court of Appeals in Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312 (1966). In *Seider*, the court upheld the assertion of attachment jurisdiction over the obligation of an insurer to defend its insured, even though the insured had no contacts with the forum. 216 N.E.2d at 313-314. That the insurer was present and doing business in the forum and subject to general jurisdiction of the New York courts was deemed sufficient, ipso facto, to justify the attachment. *Id.* While *Seider* jurisdiction has survived constitutional attack, its availability has been limited to an action initiated by resident plaintiffs. *See, e.g.*, Minichiello v. Rosenburg, 410 F.2d 106, 110 (2nd Cir.)(en banc)(state residents have right to proceed directly against insurers doing business in the state), *cert. denied*, 396 U.S. 844 (1969); Simpson v. Loehmann, 21 N.Y.2d 990, 990, 234 N.E.2d 669, 671 (1967)(public policy does not bar state from requiring insurer to come to New York to defend suit when accident that injured a state resident occurred out of state), *reh'g denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 319 (1968). Any other use of *Seider* jurisdiction was held to be violative of due process. *Rush*, 444 U.S. at 327. In *Rush*, the Court re-

Against the backdrop of *Shaffer* and *Rush*, the Mississippi Supreme Court in *Cooley* broadened the state's jurisdiction over nonresidents. The court noted that, historically, the quasi-in-rem or attachment jurisdiction of the Mississippi courts had been limited to cases in which the claim and the presence of the nonresident's property within the state were substantially connected.[78] Cooley is a departure from this approach because the funds attached to obtain jurisdiction bore little or no relation to the wrongful death action. Applying the principles of *International Shoe* as mandated by *Rush*, the Mississippi Supreme Court determined that Tulane had sufficient contacts with Mississippi to justify the attachment of its property and the consequent exercise of jurisdiction.[79]

III. Legislation

In its 1984 session, the Mississippi Legislature enacted statutes concerning notice by publication,[80] enforcement of foreign judgments,[81] peremptory challenges,[82] venue,[83] and sovereign immunity.[84]

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jected the argument that the insurer's contacts with the forum satisfied due process and that *Seider* jurisdiction was effectively a direct action procedure, otherwise constitutional under Watson v. Employers Liability Assurance Corp., 348 U.S. 66, 70-74 (1954). *Rush*, 444 U.S. at 327-33.

[78] 462 So. 2d at 703.

[79] *Id.* at 704. Aggregating the Mississippi contacts of both the Medical Center and the University, the court enumerated the following as satisfying due process: the presence of an indebtedness in Forrest County; Tulane University's solicitation of participation by Mississippi residents in continuing education programs; Tulane's participation in intercollegiate athletic competition with Mississippi schools; participation by Tulane faculty in educational functions in Mississippi; solicitation by Tulane of contributions from Mississippi alumni; and the cooperation by medical center staff with physicians and nurses in Mississippi. 462 So. 2d at 699.

[80] Act of April 20, 1984, 1984 Miss. Laws ch. 400 § 1 (codified as amended at Miss. Code Ann. § 13-3-31 (Supp. 1984)). This legislation provides that if a newspaper otherwise qualified to serve as a means of legal notice is located in a municipality whose corporate limits encompass territory in more than one county, it will be qualified to publish legal notices for any of those counties. *Id.* Prior to this enactment a newspaper could publish legal notices for its own county only. Miss. Code Ann. § 13-3-31 (Supp. 1983).

[81] Act of April 20, 1984, 1984 Miss. Laws ch. 403 § 2 (codified at Miss. Code Ann. § 11-7-307 (Supp. 1984)). This enactment provides that an authenticated copy of a foreign judgment, when filed in the office of the circuit clerk of any county in the state, is to have the same effect and be subject to the same procedures and defenses as a judgment obtained in Mississippi circuit court. *Id.* Upon filing of the foreign judgment, the clerk shall mail notice of the filing to the judgment debtor. *Id.* at § 3 (codified at Miss. Code Ann. § 11-7-305 (Supp. 1984)). No process for enforcement of a foreign judgment shall issue until twenty days after the filing of the judgment. *Id.*

[82] Act of April 23, 1984, 1984 Miss. Laws ch. 415, §§ 1-2 (codified as amended at

The legislature approved a bill changing the number of peremptory challenges to jurors in civil actions.[85] The normal number of peremptory challenges allowed to one side is four.[86] The new statute, however, states that where there are multiple plaintiffs or defendants who are allowed additional peremptory challenges, the opposing party or parties will be allowed an equal number of peremptory challenges.[87] This statute appears to be in conflict with Rule 47(c) of the Mississippi Rules of Civil Procedure, which states only that each party is to be allowed four peremptory challenges in a trial before a twelve-member jury, and two such challenges when the jury consists of six persons.[88]

One of the most significant enactments is the amendment to the Mississippi venue statute.[89] While it does not alter the places where a civil action in circuit court may be brought,[90] the new version of the statute brings about a profound change in the rights of individual civil defendants in Mississippi. Prior to this legislation, a resident individual defendant could cause venue to be changed to his home county at any time in the proceedings until the jury was impaneled. This provision was deleted from the statute by the 1984 legislature.[91] This con-

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MISS. CODE ANN. § 11-7-145 (1972 & Supp. 1984))(equal number of peremptory challenges to jurors in civil actions allowed on each side where there are multiple plaintiffs or defendants).

[83] Act of April 23, 1984, 1984 Miss. Laws ch. 429, § 1 (codified as amended at MISS. CODE ANN. § 11-11-31 (1972 & Supp. 1984))(venue of civil actions in circuit court no longer required to be in defendant's home county).

[84] Act of May 15, 1984, 1984 Miss. Laws ch. 495, §§ 1-12 (codified at MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1984))(sovereign immunity of state and its political subdivisions from tort suits and exceptions thereto). For a discussion of judicial developments in sovereign immunity, see *supra* note 22.

[85] MISS. CODE ANN. § 11-7-145 (Supp. 1984).

[86] *Id. See also* MISS. R. CIV. P. 47(c).

[87] MISS. CODE ANN. § 11-7-145(1)(Supp. 1984).

[88] MISS. R. CIV. P. 47(c). Where there were multiple plaintiffs or defendants, the rule has always been that they were allowed additional peremptory challenges only when their interests were in conflict. *See, e.g.*, Commercial Credit Equip. Co. v. Kilgore, 221 So. 2d 363, 367 (Miss. 1969)(when interests of two defendants coincide they are considered as one for purposes of peremptory challenges); Acree v. Collins, 239 Miss. 583, 587, 124 So. 2d 118, 119 (1960)(in action against owner of truck and driver in which agency was central issue, each party allowed four peremptory challenges).

[89] MISS. CODE ANN. § 11-11-3 (Supp. 1984).

[90] The suit may be commenced "in the county in which the defendant or any of them may be found or in the county where the cause of action may occur or accrue." *Id.*

[91] MISS. CODE ANN. § 11-11-3 (1972) read in part, "If a citizen resident in this state shall be sued in any action, not local, out of the county of his household and residence, . . . the venue shall be changed, on his application, before the jury is impaneled, to the county of his household and residence." During the 1984 session of the legislature, the

trast with existing case law emphasizes the importance of the defendant's perogative to change venue at any time before trial.[92]

The 1984 sovereign immunity statute[93] in effect overrules the supreme court's decision in *Pruett v. City of Rosedale*,[94] which ended judicially created sovereign immunity that had prohibited all tort suits by private parties against the state and its political subdivisions. The statute basically reinstates sovereign immunity[95] but also allows specific exceptions to its applicability. Claims for money damages arising out of tortious acts by government entities and their employees while acting in the scope of their employment are allowed,[96] although malice, fraud, libel, slander, defamation or any criminal offense by a state employee is still protected from suit.[97] An act or omission by a governmental employee exercising ordinary care in reliance upon a statute, ordinance, or regulation, and the performance of, or failure to perform, a discretionary function of a governmental entity are two of the most important exceptions to the waiver of immunity contained in section 6 of this act.[98] This statute has a two-year statute of limitations[99] and

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above section of the statute was deleted. MISS. CODE ANN. § 11-11-3 (Supp. 1984).

[92] *See, e.g.*, Gillard v. Great Southern Mtg. & Loan Corp., 354 So. 2d 794, 797 (Miss. 1978)(having suit tried in home county is defendant's valuable and substantial right). *But see* Belk v. State Dept. of Pub. Welfare, 473 So. 2d 447 (1985)(defendant's failure to timely object to venue may constitute waiver; valid default judgment may then be taken).

[93] MISS. CODE ANN. §§ 11-46-1 to -21 (Supp. 1984). The statute is clearly a stop gap measure. Judicially created sovereign immunity was to expire July 1, 1984. *See* Pruett v. City of Rosedale, 421 So. 2d 1046, 1052 (abolition of sovereign immmunity given prospective effect). The current statute is to be effective from and after July 1, 1984 but is to stand repealed from and after July 1, 1985. MISS. CODE ANN. § 11-46-1 to -21.

[94] 421 So. 2d 1046 (Miss. 1982). Prior to *Pruett*, judicially created sovereign immunity had been held applicable to all tort suits against the state and its subdivisions without exception. McKlemurry v. University Medical Center, 380 So. 2d 251, 251 (Miss. 1980). The Mississippi Supreme Court, in other opinions, stated that sovereign immunity was no longer desirable, but that it was the legislature's prerogative to abolish the doctrine. *See* Jones v. Knight, 373 So. 2d 254, 257 (Miss. 1979)(affirmed demurrer to suit for assault and battery against Mississippi Park Commission).

[95] MISS. CODE ANN. § 11-46-3 (Supp. 1984). The immunity for the state will begin on July 1, 1985, and will commence on October 1, 1985, for the state's political subdivisions. *Id.*

[96] MISS. CODE ANN. § 11-46-5(1)(Supp. 1984).

[97] *Id.* at § 11-46-5(2). Criminal offenses include everything but traffic violations. The remedy provided by this act against a governmental entity is exclusive of all other civil action against that entity. *Id.* at 11-46-7.

[98] *Id.* at 11-46-9(b), (c). A claim arising out of the assessment or collection of any tax or fee shall also fail if brought against a governmental entity. *Id.* at § 11-46-9(b). Sovereign immunity will also apply to an action "arising out of the detention of any

$500,000 ceiling on the liability of a governmental entity from a single occurrence,[100] if suit can be brought under an exception. Punitive damages and interest prior to judgment are proscribed, as are attorney's fees in cases where not specifically authorized by law.[101]

Mark Caraway
Danny Mulholland

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goods or merchandise by any law enforcement officer unless such detention is of a malicious or arbitrary and capricious nature." *Id.* at § 11-46-9(i).

[99] *Id.* § 11-46-11(2). Venue for such a suit against the state will be in the county in which the cause of action arose or in Hinds County. *Id.* at § 11-46-13(2). The venue for all other suits brought under the act will be in the county in which the principal offices of the governing body of the political subdivision are located. *Id.*

[100] *Id.* at 11-46-15(1).

[101] *Id.* at 11-46-15(2).

CORPORATE, CONTRACT & COMMERCIAL LAW

In 1984, the Mississippi Supreme Court decided twenty-four cases involving corporate, contract, and commercial law. Several decisions may be regarded as significant developments in the areas of corporate and commercial law. Specifically, these developments include the standard of liability of corporate officers and directors who continue to act in the corporate name after suspension of the corporate charter;[1] promisee-shareholder standing to sue for breach of a third-party beneficiary contract to which the corporation is the beneficiary;[2] and the legal capacity of state subdivisions to bring suit for breach of contract.[3] Accordingly, these cases have been chosen for textual commentary. Decisions of lesser importance include the procedural aspects of garnishment;[4] the enforceability of an oral contract to lend money;[5] the standard of proof for damages for breach of contract;[6] the standard governing use of summary judgment procedure in contract actions;[7] the use of the price escalation clause in state highway contracts;[8] the use of fraud as a defense against holder-payee;[9] the liability of a corporate

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[1] Flanagan v. Jackson Wholesale Bldg. Supply, 461 So. 2d 761 (Miss. 1984). For further discussion of this case, see *infra* notes 23-39 and accompanying text.

[2] Vickers v. First Miss. Nat'l Bank, 458 So. 2d 1055 (Miss. 1984); see *infra* notes 40-63 and accompanying text.

[3] Grenada Mun. Separate School Dist. v. Jesco, Inc., 449 So. 2d 226 (Miss. 1984); see *infra* notes 64-84 and accompanying text.

[4] First Miss. Nat'l Bank v. KLH Indus., Inc., 457 So. 2d 1333, 1338 (Miss. 1984)(procedural aspects of garnishment remedy regulated in first instance by garnishment statutes; Mississippi Rules of Civil Procedure supplement where not inconsistent).

[5] Beck v. Goodwin, 456 So. 2d 758, 761 (Miss. 1984)(oral contract to lend money unenforceable for vagueness and indefiniteness where no agreement regarding amount, security, repayment, and interest, or when loan was to be given).

[6] Cain v. Mid-South Pump Co., 458 So. 2d 1048, 1050, 1051 (Miss. 1984)(opinion of water-well driller possessing twenty-three years' experience as to cost for repair of water well sufficient to establish damages of reasonably certain nature).

[7] Biggers v. Fox, 456 So. 2d 761, 763 (Miss. 1984)(summary judgment procedure inappropriate to decide rights under contract where terms are ambiguous); Dennis v. Searle, 457 So. 2d 941, 945 (Miss. 1984)(same).

[8] Farrish Gravel Co. v. Mississippi State Highway Comm'n, 458 So. 2d 1066, 1069 (Miss. 1984)(clause in Highway Commission construction contract eliminating price escalation provision during period after contract completion date not violative of statute authorizing implementation of price adjustment program).

[9] Martin v. Winfield, 455 So. 2d 762, 764 (Miss. 1984)(recognizing fraud in procurement as defense to breach of contract action by holder-payee not holder in due course).

manager for missing funds;[10] the nature and elements of accord and satisfaction;[11] construction of contracts;[12] the corporation as an indispensible party in a dissolution action;[13] the nature of consideration in judicial sales of property pursuant to section 11-5-93 of the Mississippi Code;[14] the proper procedure to subject a bank to contempt for failure to abide by court order conditioning release of funds held by the bank;[15] bank liability for negligent misrepresentation;[16] the construction of a release agreement;[17] the tax exempt status of industry under section 57-3-33 of the Mississippi Code;[18] the use of quantum meruit in services contracts;[19] the proper measure of damages in partially per-

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[10] Patterson v. Merchants Truck Line, Inc., 448 So. 2d 288, 292 (Miss. 1984)(corporate manager liable for missing funds where manager responsible for such funds and admitted receiving funds and attempting cover-up).

[11] Red Enter., Inc. v. Peashooter, Inc., 455 So. 2d 793, 794 (Miss. 1984)(accord and satisfaction is affirmative defense); Cook v. Bowie, 448 So. 2d 286, 287 (Miss. 1984)(meeting of minds is essential element of accord and satisfaction).

[12] Frazier v. Northeast Miss. Shopping Center, Inc., 458 So. 2d 1051, 1054 (Miss. 1984)(construction of contract leading to harsh results to be avoided unless terms are clear and unambiguous).

[13] Fairchild v. Keyes, 448 So. 2d 292, 294 (Miss. 1984)(corporation is indispensible party in action to dissolve corporation).

[14] McCormick v. McCormick, 449 So. 2d 1209, 1211 (Miss. 1984)(although judicial order pursuant to section 11-5-93 (1972) directs sale of property for cash, cashier's check is acceptable if converted into cash and no prejudice results).

[15] Mississippi Bank v. Kelly, 445 So. 2d 849, 851 (Miss. 1984)(bank not subject to contempt for failure to abide by chancery court decree requiring that guardianship funds on deposit at bank not be withdrawn without court order since bank not given notice and opportunity to be heard).

[16] Berkline Corp. v. Bank of Miss., 453 So. 2d 699, 702 (Miss. 1984)(bank subject to liability for negligent misrepresentation where bank officer or agent makes false statement of material fact without exercise of reasonable care as to accuracy and customer relies on statement to his detriment).

[17] Smith v. First Fed. Sav. & Loan Ass'n, 460 So. 2d 786, 790 (Miss. 1984)(release agreement containing clear language releasing debtor of obligation on business loans did not, despite entitlement of agreement as general release, act as release for unrelated personal secured obligations).

[18] Board of Supervisors v. Hattiesburg Coca-Cola Bottling Co., 448 So. 2d 917, 920-21 (Miss. 1984)(since section 57-3-33 grants counties and municipalities power to issue general obligation bonds in support of industrial development, legislature intended that incidental lease agreements entered into between counties and industry benefit bondholder-industry; such industry is exempt from ad valorem taxes; section 182 of Mississippi Constitution limits exemption to ten-year period).

[19] Shaw v. Ladner, 447 So. 2d 1272, 1274-75 (Miss. 1984)(computation of reasonable value of service under "quantum meruit" recovery did not require offset of use of decedent's home, land, and sale of crops since these did not constitute material benefits to provider of services).

formed contracts;[20] the burden of proof as to conditions subsequent;[21] and the proper standard for conviction under an embezzlement statute.[22]

I. Corporate Law

A. Liability of Corporate Officers and Directors Under Section 79-3-285

Section 79-3-285 of the Mississippi Business Corporation Act provides that "[a]ll persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof."[23] In *Flanagan v. Jackson Wholesale Building Supply Co.*,[24] the Mississippi Supreme Court delineated the circumstances in which corporate officers and directors may be deemed to have assumed to act as a corporation for purposes of liability under section 79-3-285. The court held that corporate officers and directors who maintain an active role in the control or management of a corporation during times when the corporate charter of the corporation has been suspended will be personally liable for all debts incurred during such times.[25]

In 1974, when Bob Flanagan incorporated his home building and remodeling business, both he and his wife, Sarah Flanagan, were listed as directors of the corporation in the certificate of incorporation, which both signed. Mrs. Flanagan and her husband were also authorized to sign checks on the corporate bank account. From the time of incorporation in 1974 until 1981, the finances of the corporation and the Flanagan household were intermingled. Mr. Flanagan regularly used the corporate account to pay for business and personal expenses as well as Mrs. Flanagan's personal and household expenses. In addition, Mrs. Flanagan on occasion made loans to her husband which were deposited in the corporate bank account. In further support of the corpo-

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[20] Wright v. Stevens, 445 So. 2d 791, 798 (Miss. 1984)(where contract only partially performed, breaching party liable for all damages foreseeable at time of contract formation).

[21] Weems v. American Sec. Ins. Co., 450 So. 2d 431, 435 (Miss. 1984)(burden of proving condition subsequent on party asserting its occurrence).

[22] Shelley v. State, 447 So. 2d 124, 126 (Miss. 1984)(receipt of monies pursuant to construction contract where construction left incomplete is insufficient alone to establish criminal intent for purposes of conviction under criminal embezzlement statute).

[23] Miss. Code Ann. § 79-3-285 (1972).

[24] 461 So. 2d 761 (Miss. 1984).

[25] *Id.* at 765.

rate enterprise, Mrs. Flanagan performed a number of secretarial duties.[26]

On December 5, 1978, the corporate charter of Flanagan Construction Company was suspended by the secretary of state for failure to file an annual report.[27] The business, however, remained in operation under the corporate name and continued to maintain an open account with Jackson Wholesale Supply. Pursuant to two orders placed by Mr. Flanagan with Jackson Wholesale during the fall of 1980, Mrs. Flanagan personally picked up bulding materials from Jackson Wholesale.[28] Upon Mr. Flanagan's death in January of 1981, Jackson Wholesale successfully brought suit against Flanagan Construction and Mrs. Flanagan, individually and as administratrix, for the unpaid debts incurred subsequent to the suspension of the corporate charter.[29]

On appeal, Mrs. Flanagan contended that she had not "assumed to act as a corporation" and was, therefore, outside the scope of section 79-3-285. The Mississippi Supreme Court first resorted to the rule announced in *Carolina Transformer Co. v. Anderson,* [30] the only Mississippi case construing section 79-3-285. *Carolina Transformer* established that a corporate officer or director who personally incurs a debt in the corporate name subsequent to the suspension of the corporate charter assumes to act as a corporation without authority and is, therefore, personally liable for the amount of the debt.[31] Applying the above

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[26] *Id.* at 762-63.

[27] *Id.* at 763. MISS. CODE ANN. § 79-3-189 (1972) provides in part:

> If any foreign or domestic corporation required by statute to file an annual report with the secretary of state shall fail or neglect to file such report when due, then the secretary of state shall mail to that corporation at its last known post-office address, a notice of delinquency . . . . Such notice of delinquency shall state the specific violation of the Mississippi Business Corporation Law, and offer the corporation a period of not more than ninety (90) days from the date thereof within which to file said report. If no report shall be filed by the corporation and the fee and penalty for late filing shown due shall not be paid in response to such notice on or before the expiration of the ninety (90) days allowed, then the secretary of state shall, within thirty (30) days thereafter, suspend the right of such corporation to perform any act or right acquired by the charter or articles of incorporation . . . .

Id.

[28] 461 So. 2d at 762-63.

[29] *Id.* at 762.

[30] 341 So. 2d 1327 (Miss. 1977).

[31] *Id.* at 1329-30. In *Carolina Transformer*, the owner of the corporation continued to operate the business in the corporate name after suspension of the corporate charter by personally placing orders with a supplier. *Id.* at 1328. When the account became delinquent, the supplier sued the corporation and the owner pursuant to § 79-3-285. *Id.*

rule to the facts before it, the *Flanagan* court determined that Mrs. Flanagan had not personally placed the particular orders which gave rise to the debt sued upon, and thus the court found that Mrs. Flanagan was not within the purview of *Carolina Transformer*.[32]

Not content with resting its decision on this finding, the *Flanagan* court further considered whether there may nonetheless be instances where a corporate officer or director would have assumed to act as a corporation without having personally incurred the debt sued upon.[33] Finding a lack of pertinent Misissippi decisional law on this point, the court made reference to decisions of the Florida[34] and Oregon[35] Supreme Courts that had construed the phrase "assume to act as a corporation" contained in statutes substantially identical to section 79-3-285.[36] The *Flanagan* court found the reasoning set forth in those decisions persuasive and adopted the same rule, extending liability to those corporate officers and directors who maintain an active role in the control or management of a corporation that continues to operate without the benefit of a corporate charter.[37]

The Mississippi Supreme Court held that the owner was personally liable for the debt. The court reasoned that by virtue of the suspension of the corporate charter for failure to comply with § 79-3-189, which requires the filing of annual reports, the corporation no longer retained the right to exercise corporate powers granted by the state. *Id.* at 1330. The court further reasoned that, as a consequence, any person who continued to act in the corporate name was without authority to so act and, therefore, was liable under § 79-3-285 for all debts arising from the unauthorized action. *Id.*

[32] 461 So. 2d at 764.

[33] *Id.* at 764-65.

[34] Mobil Oil Corp. v. Thoss, 385 So. 2d 726, 727 (Fla. Ct. App. 1980)(intent of statute is to impose personal liability on directors, officers or agents who exercise control over operation of corporation or actions in question).

[35] Timberline Equip. Co. v. Davenport, 267 Or. 64, 514 P.2d 1109, 1114 (1973)("persons who assume to act as a corporation" include those who have an investment in the business and who actively participate in policy and operational decisions); *see also* Mullenax v. Edwards Sheet Metal Works, Inc., 279 Ark. 247, 650 S.W.2d 582, 583-84 (1983)(corporate officer personally liable for corporate debts incurred during period when charter was suspended); Kessler Distrib. Co. v. Neill, 317 N.W.2d 519, 521 (Iowa App. 1982)(president of suspended corporation liable because he personally accepted delivery of supplies; some showing required by plaintiff that individual sought to be held liable personally incurred debt).

[36] Miss. Code Ann. § 79-3-285 is essentially a duplicate of § 146 of the Model Business Corporation Act. The official comment to § 146 indicates that the section was designed to prohibit the formation of defacto corporations. Thus, the threat of personal liability was meant to induce businesses to abide by the formal procedure established by each jurisdiction in the formation and regulation of corporate activity. Model Bus. Corp. Act Ann. 2d § 146 (1971).

[37] 461 So. 2d at 764.

Considering the facts before it, the *Flanagan* court reasoned that although Mrs. Flanagan was a corporate director and signed the certificate of incorporation and although the finances of Flanagan Construction and the family household were intermingled, there was insufficient proof to demonstrate that Mrs. Flanagan in fact exercised control over or participated in the management of the corporation.[38]

Logic insists that the rule formulated in the instant case is a reasonable elaboration of the *Carolina Transformer* rule governing the class of individuals subject to liability under section 79-3-285. A rule which restricts liability to those corporate officers or directors who personally incur debts in the corporate name during times when authority for such action is lacking ignores the reality of corporate life. In a corporate setting, one who incurs a debt is often acting under the direction of, or in conjunction with, another individual.[39] Thus, a rule which renders liable those who either personally incur the debt or actively participate in the control or management of the corporation more completely reaches those who are in fact responsible for the debt.

B. Standing of Promisee-Shareholder to Sue for Breach of Third-Party Beneficiary Contract

In *Vickers v. First Mississippi National Bank*,[40] the Mississippi Supreme Court considered whether, in situations involving third-party beneficiary contracts, a promisee-shareholder of the beneficiary corporation had standing to sue for damages resulting from the breach of the contract by the promisor, where such damages were sustained in his individual capacity and were caused by a breach of a duty owing directly to the promisee.[41]

On January 19, 1976, James Vickers, who had substantial experience in the marine construction business, executed an agreement with First Mississippi National Bank (bank) and four members of the Toche family, sole stockholders of the Toche Corporation. The agreement provided that the bank was to provide Toche, a non-party to the agreement, long-term and interim construction financing for its marine construction activities and for refinancing certain indebtedness. In addition, the Toche family would transfer to Vickers the ownership of all

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[38] *Id.* at 765.

[39] See the discussion presented in Timberline Equip. Co. v. Davenport, 267 Or. 64, 514 P.2d 1109, 1113-14 (1973) regarding the equities associated with this interpretation, imposing liability on individuals active in corporate management.

[40] 458 So. 2d 1055 (Miss. 1984).

[41] *Id.* at 1056.

Toche stock.[42] Vickers agreed to guarantee personally a portion of the loan to Toche. It was further agreed that in the event of the bank's foreclosure, sale proceeds would be applied first to the guaranteed portion of the indebtedness. Two years after the agreement was consummated, Vickers and Toche were forced into bankruptcy. Vickers then brought suit on behalf of Toche and himself against the bank, seeking damages sustained as a result of the bank's failure to provide the promised interim financing.[43] The trial court granted summary judgment in favor of the bank on the ground that Vicker's damages were derivative in nature and therefore he lacked standing to bring suit against the bank.[44]

In *Bruno v. Southeastern Services, Inc.*,[45] a stockholder who owned all the stock in a corporation brought suit in his individual capacity in order to recover damages suffered by the corporation resulting from breach of contract.[46] The Mississippi Supreme Court held that a stockholder has no individual right of action against third persons who wrongfully cause injury to the corporation, even though the injury was the diminution in value of the corporate stock.[47] The court determined this to be the rule even in cases where the stockholder owns all of the stock in the corporation.[48] The underlying rationale for the rule consists of essentially four elements: (1) the corporation is an entity separate and distinct from its stockholders who possess no legal interest in the corporate property; (2) the third person is protected from a multiplicity of suits; (3) impairment of creditor's rights is avoided since the recovery belongs to the corporation; and (4) a corporate recovery benefits all stockholders equally.[49] Thus, because the cor-

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[42] *Id.* at 1057. The agreement also provided that the bank would grant a loan to the Toche Corporation, a portion of which was personally guaranteed by Vickers. *Id.*

[43] *Id.* at 1059. Vickers and the trustee in bankruptcy sued for recovery of damages, *id.*, including the loss of income and profits incurred by Toche, the loss of Vickers' original investment, and the loss of sums due the Internal Revenue Service. *Id.* at 1061. Vickers also sought to recover the sum he expended in his effort to replace the interim construction financing withheld by the bank. *Id.* at 1062.

[44] *Id.* at 1059-60.

[45] 385 So. 2d 620 (Miss. 1980).

[46] *Id.* at 620.

[47] *Id.* at 621-22 (quoting Schaffer v. Universal Rundle Corp., 397 F.2d 893, 896 (5th Cir. 1968)(applying Texas Law)).

[48] 385 So. 2d at 622; *see also* McDonald v. Bennett, 674 F.2d 1080, 1085-86 (5th Cir. 1982)(general rule applicable where individual is sole shareholder); Schaffer v. Universal Rundle Corp., 397 F.2d 893, 896 (5th Cir. 1968)(same); Stennett v. Paramount Famous Lasky Corp., 37 S.W. 2d 145, 149 (Tex. Comm'n App. 1939)(general rule applies in case where complaining shareholder owns all or substantially all of stock).

[49] 385 So. 2d at 622 (quoting 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 119.03 [1] at

poration is regarded as a separate entity and the stockholder does not have a legal interest in the stock he holds, the stockholder's rights are deemed to be derivative. Therefore, a direct action may only be maintained by the corporation in cases where the injury complained of is to corporate property and results from a breach of a duty owing directly to the corporation.[50]

In considering the question of whether the *Bruno* rule prevented Vickers from bringing the present action, the *Vickers* court first undertook to determine whether Vickers retained any rights under the contract with the bank in his personal capacity.[51] Having characterized the agreement between Vickers and the bank as a third-party beneficiary contract,[52] the court noted the general rule that both the promisee[53] and the beneficiary[54] have the right to sue the promisor for damages arising from the breach of an obligation owing to the beneficiary.[55] Thus, the *Vickers* court determined that the bank owed an obligation to both Vickers and Toche to provide the agreed interim construction financing.[56] The court further held that, under the facts as presented, Vickers was entitled to recover all reasonably foreseeable damages which he personally incurred as a result of the bank's substantial breach of the contract, but that Vickers would be required to file a derivative action[57] in order to recover for the damages suffered by

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119-18 (rev. ed. 1980)); *see also* Cowin v. Bresler, 741 F.2d 410, 414 (D.C. Cir. 1984)(discussion of rationale underlying rule requiring corporation to bring suit where injury is to corporate property). *See generally* 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5921 (rev. perm. ed. 1980).

[50] 385 So. 2d at 622.

[51] 458 So. 2d at 1062.

[52] *Id.* at 1062-63.

[53] *Id.* at 1062. *See, e.g.,* Insurance Premium Serv., Inc. v. Wood, 57 Tenn. App. 514, 420 S.W. 2d 595, 600 (promisee under third-party beneficiary contract may assert action against promisor). *See generally* FARNSWORTH, CONTRACTS 735-36 (1982).

[54] 458 So. 2d at 1062-63. *See, e.g.,* Goodman-Marks Assoc., Inc. v. Westbury Post Assoc., 70 A.D. 2d 145, 420 N.Y.S. 2d 26, 29 (N.Y. App. Div. 1979)(third-party beneficiary may sue promisor where performance under contract rendered directly to beneficiary); Burns v. Washington Sav., 251 Miss. 789, 796-97, 171 So. 2d 322, 324-25 (1965)(third-party beneficiary has standing to sue promisor for breach of contract).

[55] 458 So. 2d at 1062-63.

[56] *Id.* at 1062-64. The *Vickers* court stated: "Vickers' primary claim over and above those precluded by *Bruno* is that the Bank breached its obligations to provide interim financing for the construction of Marine vessels. To be sure, this is an obligation the beneficiary of which was the corporation. . . . [However, Vickers would] never have become involved in Toche or undertaken any of the obligations imposed upon him personally. . . had the Bank not made a committment for interim construction financing." *Id.* at 1062.

[57] *See Bruno*, 385 So. 2d at 622 (quoting 13 W. FLETCHER, *supra* note 49, at § 5908).

Toche.[58] In so holding, the court fashioned a corollary to the *Bruno* rule, permitting a promisee-shareholder the right to recover from a promisor in a direct action all reasonably foreseeable damages sustained in his individual capacity and resulting from a substantial breach of a duty owing directly to the promisee.[59]

The present decision has established a rule that is in line with the weight of authority from other jurisdictions[60] and is consistent with the *Bruno* decision.[61] As stated by the Mississippi Supreme Court in *Bruno*,[62] the rule preventing a stockholder from maintaining a direct action against a promisor for damages inflicted on corporate property and resulting from a breach of a duty owing to the corporation is premised primarily on considerations of judicial economy and fairness.[63] Where the promisor owes an obligation to the stockholder in his individual capacity and where the stockholder sustains damages in his individual capacity, which are proximately caused by the breach of such obligation, a direct action may be maintained by the stockholder con-

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The court noted that where the basis of the suit by a shareholder is a wrong to the corporation, redress must be sought in a derivative suit to which the corporation is an indispensable party. The right of the shareholder to bring the suit is derivative or secondary to the corporation. *Id.*

[58] 458 So. 2d at 1061-62.

[59] *Id.* at 1064. The *Vickers* court declined to construe *Bruno* as preventing a promisee from maintaining a separate action in instances where the promisee happens to be a shareholder in the corporate beneficiary. *Id.* at 1063. Instead, the court stated: "what—and all—*Bruno* holds. . . is that a promisee plaintiff has no standing to sue and recover from a promisor where all damages claimed were in fact sustained by the corporate beneficiary and where the losses incurred by the promisee were wholly derivative from the losses to the corporation." *Id.*

[60] *See, e.g.*, Empire Life Ins. Co. of Am. v. Valdak Corp., 468 F.2d 330, 335 (5th Cir. 1972)(shareholder injured in individual capacity due to breach of duty owing to him directly may maintain direct action against promisor); Buschmann v. Professional Men's Assoc., 405 F.2d 659, 662 (7th Cir. 1969)(direct action may be asserted where alleged wrong is both to shareholder as individual and to corporation); Eden v. Miller, 37 F.2d 8, 9-10 (2d Cir. 1930)(where promise is for benefit of both corporation and promisee organizer of corporation, promisee may bring action to recover damages individually incurred as proximate result of breach); Sedco Int'l, S.A.V. Corp., 522 F. Supp. 254, 314 (S.D. Iowa 1981)(individual holding dual role as shareholder and creditor may bring direct action for breach of duty owing to him as creditor); Banker's Trust Co. v. Steenburn, 95 Misc. 2d 967, 409 N.Y. S. 2d 51, 63-65 (1978)(where stockholder-promisee injured in individual capacity, he may recover from promisor); Cullum v. General Motors Acceptance Corp., 115 S.W. 2d 1196, 1201 (Tex. Civ. App. 1938)(stockholder-promisee may sue promisor for individual injuries sustained as result of breach). *See generally* 13 W. FLETCHER, *supra* note 49, at § 5921.

[61] 385 So. 2d 620, 622 (Miss. 1980).

[62] *Id.* at 622.

[63] *Id; see supra* note 49 and accompanying text.

sistent with the *Bruno* rationale since stockholder status, although not strictly fortuitous, is irrelevant to the nature of the injury suffered.

II. Commercial Law

In *Grenada Municipal Separate School District v. Jesco, Inc.*,[64] the court considered whether a subdivision of the state has the capacity to bring suit for damages under a contract to which it is a party. The specific question before the court was whether a municipal separate school district had the capacity to bring suit for breach of contract in order to recover damages arising from the negligent construction of school buildings.[65] The court answered this question in the affirmative, holding that where a subdivision of the state has the authority to enter into a contract, the subdivision thereby retains the legal capacity to sue for breach of the contract.[66]

The Grenada Municipal Separate School District entered into a contract with Jesco whereby Jesco agreed to construct a school building according to the design specifications to be provided by the school district.[67] Subsequent to the completion of construction Grenada brought suit against Jesco alleging faulty construction.[68] Jesco moved to dismiss the suit contending that Grenada lacked the necessary statutory authority to sue and therefore did not have the capacity to bring the action.[69] In support of this contention, Jesco cited *Storey v. Rhodes*[70] for the proposition that subdivisions of the state do not have the power to sue or be sued unless such power is expressly conferred by statute.[71] In further support of the motion to dismiss, Jesco contended that, according to section 7-5-1 of the Mississippi Code,[72] only the at-

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[64] 449 So. 2d 226 (Miss. 1984).

[65] *Id.* at 226.

[66] *Id.* at 227.

[67] *Id.* at 226.

[68] *Id.* The school district also brought suit against the architect, the bonding company, the subcontractors and the furnishers of building materials. The district alleged that all of the named defendants were responsible for the defective condition of the school building roof. *Id.*

[69] *Id.* at 226.

[70] 178 Miss. 776, 174 So. 560 (1937).

[71] 178 Miss. 776, 174 So. at 561.

[72] Miss. Code Ann. § 7-5-1 (1972) provides in part:

> [The attorney general] shall be the chief legal officer and advisor for the state, both civil and criminal, and is charged with managing all litigation on behalf of the state. . . . He shall have the powers of the attorney general at common law and is given the sole power to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest. . . .

torney general possessed the authority to bring an action on behalf of a state agency. The trial court rendered judgment in favor of the defendant.[73]

Considering the question before it, the Mississippi Supreme Court noted that a municipal separate school district had been granted the authority, pursuant to sections 37-7-619[74] and 37-7-301,[75] to enter into contracts for the construction and maintenance of school facilities.[76] Having found that the Grenada Municipal Separate School District had the authority to enter into the contract with Jesco, the court next considered whether the school district could sue for breach of the contract. The court, making reference to section 11-45-11,[77] which grants to the state the general authority to sue, determined that the same statute vests subdivisions of the state with the capacity to bring suit.[78] The court also premised its decision on considerations of public policy, stating that it "would be against public policy to authorize the separate school district . . . to enter into a specific contract to spend the district taxpayer's money. . . and leave that contracting party without the right to enforce its terms."[79] The proposition found in *Storey v.*

Id.

[73] 449 So. 2d at 226.

[74] MISS. CODE ANN. § 37-7-619 (1972) provides:

> The boards of trustees of municipal separate school districts shall have the same powers, authority, and duties as are imposed and conferred upon the boards of trustees of school districts under the provisions of sections 37-7-231, 37-7-233, 37-7-301 to 37-7-311, 37-9-71, and 37-11-27. In addition thereto, such boards of trustees shall have the powers, authority, and duties imposed and conferred upon them by this article and any other statute.

Id.

[75] MISS. CODE ANN. § 37-7-301 provides in part:

> The boards of trustees of school districts shall have the following powers, authority, and duties in addition to all others imposed or granted by law, to wit . . . . (d) to have responsibility for the erection, repairing, and equiping of school facilities and the making of necessary school improvements . . . .

Id.

[76] 449 So. 2d at 227.

[77] MISS. CODE ANN. § 11-45-11 (1972) provides in part: " The state shall be entitled to bring all actions and all remedies to which individuals are entitled . . . ." *Id.*

[78] 449 So. 2d at 227. The court stated: "The Grenada Municipal Separate School District is a subdivision of the state, and as such, comes within the terms of the statute [section 11-45-11] without expressly in the declaration calling itself 'The State of Mississippi.' " *Id.*

[79] *Id.* For additional support of its holding, the court stated the general rule that when the legislature authorizes the state's entry into a contract, the state thereby waives its sovereign immunity from suit for breach of the contract, *id.* (quoting Cig Contractors, Inc. v. Mississippi State Bldg. Comm'n, 399 So. 2d 1352, 1355 (Miss. 1981) and Missis-

Rhodes[80] was characterized as dicta and was therefore found not to be controlling.[81] The court thus held that where a particular subdivision of the state possesses the general authority to enter into a particular contract, that subdivision also possesses the capacity to sue for breach of the contract.[82] As to the contention that only the attorney general had the power to bring the present action on behalf of the Grenada Municipal Separate School District,[83] the court found that such power was exclusive only where the subject matter of the suit was of statewide interest, which was not true in the present case because of its essentially local nature.[84]

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sippi State Dep't of Public Welfare v. Howie, 449 So. 2d 772, 777 (Miss. 1984)). Noting that *Cig* and *Howie* involved situations where the state agency was being sued for breach of contract and was attempting to use the doctrine of sovereign immunity in order to avoid liability, the court stated that "the argument for a valid cause of action is much stronger [in the present case]. The Grenada Municipal Separate School District is not trying to immune itself from suit as a defense . . . ." 449 So. 2d at 227.

[80] 178 Miss. 776, 174 So. at 561.

[81] 449 So. 2d at 277-78.

[82] *Id.* at 277.

[83] *See* MISS. CODE ANN. § 7-5-1 (1972).

[84] 449 So. 2d at 278.

CRIMINAL LAW

I. Introduction

During 1984, the Mississippi Supreme Court rendered 138 decisions pertaining to criminal law and procedure. Of these decisions, 131 do not merit extended discussion as they dealt with appeal and error,[1] validity of arrest warrants,[2] attorney misconduct,[3] admissibility of confessions and other pretrial statements,[4] bail bonds,[5] child abuse,[6] con-

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[1] Wilson v. State, 461 So. 2d 728, 729 (Miss. 1984)(circuit court may grant enlargement of time to parties on appeal where necessary to review court reporter's notes); Redmond v. State, 457 So. 2d 1344, 1346 (Miss. 1984)(where assignment of error cites no authority, supreme court need not consider it).

[2] Lockett v. State, 459 So. 2d 246, 249-50 (Miss. 1984)(arrest warrant issued by police dispatcher held invalid).

[3] Smith v. State, 457 So. 2d 327, 334-36 (Miss. 1984)(cumulative effect of several prosecutorial improprieties may destroy defendant's right to fair trial); Gardner v. State, 455 So. 2d 796, 800 (Miss. 1984)(mistrial for improper remarks by prosecutor not mandated where defense failed to ask for curative instruction); Shavers v. State, 455 So. 2d 1299, 1302 (Miss. 1984)(improper closing remarks no basis for reversal without contemporaneous objection); Booker v. State, 449 So. 2d 209, 219 (Miss. 1984)(attorney's reference to reviewability of death sentence not reversible error without contemporaneous objection).

[4] Houston v. State, 461 So. 2d 720, 723-24 (Miss. 1984)(confession by juvenile defendant held admissible where freely and knowingly made); Jones v. State, 461 So. 2d 686, 698-701 (Miss. 1984)(defendant has right to end or limit interrogation at any time; confession extracted after defendant expressed desire to terminate interrogation held inadmissible); Compton v. State, 469 So. 2d 847, 849 (Miss. 1984)(failure to give *Miranda* warnings does not taint confession of suspect not in custody); Lockett v. State, 459 So. 2d 246, 249-50 (Miss. 1984)(where independent and lawful grounds for arrest existed, invalidity of arrest warrant did not render confession inadmissible); Redmond v. State, 457 So. 2d 1344, 1346 (Miss. 1984)(existence of confession is jury question, but voluntariness is question for court); King v. State, 451 So. 2d 765, 766-69 (Miss. 1984)(where confession was induced by offer of immunity conditioned on defendant's willingness to testify, confession held admissible against defendant after he reneged); Neal v. State, 451 So. 2d 743, 756 (Miss. 1984)(evidence of defendant's mental infirmity is one of several factors determining voluntariness of confession); Wilson v. State, 451 So. 2d 724, 726-27 (Miss. 1984)(error for judge to comment on voluntariness of confession); Booker v. State, 449 So. 2d 209, 214 (Miss. 1984)(voluntariness of confession is question of fact for court to determine).

[5] Peterson v. Sandoz, 451 So. 2d 216, 219 (Miss. 1984)(senate bill requiring professional bondsmen to pay fee for each bond taken is constitutional, nondiscriminatory, reasonable, and serves legitimate state interest).

[6] Cardwell v. State, 461 So. 2d 754, 761 (Miss. 1984)(where both parents have history of child abuse, only parent placed at scene of fatal abuse can be charged with mur-

spiracy,[7] constitutional law,[8] consolidation of cases,[9] motions for directed verdicts,[10] writs of error coram nobis,[11] modification of criminal

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der); Shelton v. State, 445 So. 2d 844, 848 (Miss. 1984)(evidence of previous similar incidents of child abuse admissible to show continuing pattern of abuse).

[7] McDonald v. State, 454 So. 2d 488, 494-95 (Miss. 1984)(to be co-conspirator, defendant must have knowingly and intentionally engaged in plan to further and accomplish criminal purpose).

[8] Smith v. State, 463 So. 2d 1033, 1035 (Miss. 1984)(county court's imposition of more severe sentence after trial de novo on appeal from justice court not unconstitutional); Moore v. State, 461 So. 2d 768, 770 (Miss. 1984)(revocation of prisoner's "good time" is administrative rather than criminal procedure and does not raise double jeopardy problems); Harden v. State, 460 So. 2d 1194, 1201-02 (Miss. 1984)(under double jeopardy clause, acquittal of capital murder does not bar prosecution for arson arising from same incident); Smith v. State, 457 So. 2d 327, 333 (Miss. 1984)(double jeopardy clause does not bar second action against defendant where general verdict of acquittal in first action could have been based on grounds other than those defendant seeks to preclude in second action); Wilcher v. State, 455 So. 2d 727, 732 (Miss. 1984)(double jeopardy clause no bar to prosecution of defendant for separate and distinct felony underlying previous conviction); McGruder v. State, 454 So. 2d 1310, 1311 (Miss. 1984)(exercise of some selectivity in prosecution does not, in itself, violate Constitution); Parker v. State, 454 So. 2d 910, 911-912 (Miss. 1984)(trial court's denial of defendant's motion for recess when defendant and defendant's counsel were "exhausted" after full day in court amounted to denial of due process); Murphy v. State, 453 So. 2d 1290, 1292-93 (Miss. 1984)(attorney's tactical decision not to cross-examine did not deprive defendant of right of confrontation); Knebel v. City of Biloxi, 453 So. 2d 1037, 1040-41 (Miss. 1984)(fifth amendment permits city to dismiss policemen for not taking polygraph tests); DeBussi v. State, 453 So. 2d 1030, 1033-34 (Miss. 1984)(double jeopardy clause barred second action in which state would have attempted to cure evidentiary defect that caused dismissal of first action); Seely v. State, 451 So. 2d 213, 214 (Miss. 1984)(defendant not deprived of right to be heard where he freely elected to present no testimony); Wilcher v. State, 448 So. 2d 927, 938-39 (Miss. 1984)(double jeopardy clause does not bar aggravating circumstances from being considered more than once); Lewis v. State, 445 So. 2d 1387, 1388 (Miss. 1984)(arresting officer may ask suspect's name before giving *Miranda* warnings); Contreras v. State, 445 So. 2d 543, 544 (Miss. 1984)(sodomy statute neither unconstitutionally vague nor denial of equal protection).

[9] Friday v. State, 462 So. 2d 336, 338 (Miss. 1985)(consolidation of separate charges inadmissible where evidence would not be mutually admissible in separate trials and where defendant is subject to more than one sentence).

[10] McClinton v. State, 459 So. 2d 807, 808 (Miss. 1984)(motion for directed verdict must be denied where evidence, viewed in light most favorable to state, could reasonably support conviction).

[11] In re Hill, 460 So. 2d 792, 796 (Miss. 1984)(evidence which could have been discovered by due diligence at or before trial will not qualify as newly discovered evidence to support a coram nobis petition); In re Smith, 457 So. 2d 911, 914 (Miss. 1984)(affidavits of trial witnesses admitting perjury constitute adequate grounds for granting motion to petition for writ of error coram nobis); Culberson v. State, 456 So. 2d 697, 698 (Miss. 1984)(coram nobis does not lie where defense attorney made tactical decision to reject defendant's request to testify); Gilliard v. State, 446 So. 2d 590, 592 (Miss. 1984)(coram

responsibility,[12] evidence,[13]

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nobis will lie only where facts outside record deprived petitioner of fair trial); Pruett v. Thigpen, 444 So. 2d 819, 827 (Miss. 1984)(coram nobis does not lie where issues involved were not preserved for appeal).

[12] Smith v. State, 445 So. 2d 227, 231 (Miss. 1984)(voluntary intoxication does not diminish criminal responsibility).

[13] Brown v. State, 464 So. 2d 516, 520 (Miss. 1985)(prior action reflecting defendant's state of mind held admissible where issue of self-defense raised); Lambert v. State, 462 So. 2d 308, 312 (Miss. 1984)(decision concerning prejudical effect of break in chain of custody rests within the sound discretion of trial judge); Johnson v. State, 461 So. 2d 1288, 1293-94 (Miss. 1984)(where defendant knew of effect and value of narcotics, jury may infer he had "knowledge and intent" to distribute); Course v. State, 461 So. 2d 770, 771 (Miss. 1984)(records giving name of defendant as habitual offender raise rebuttable presumption that defendant is person so named); Anderson v. State, 461 So. 2d 716, 719 (Miss. 1984)(where defendant's account of homicide is patently inconsistent with physical evidence, jury not obliged to credit it, though defendant was sole eyewitness); Rushing v. State, 461 So. 2d 710, 712 (Miss. 1984)(absent reasonable explanation, possession of goods recently stolen is evidence from which jury may infer guilt of theft); Evans v. State, 460 So. 2d 824, 827 (Miss. 1984)(testimony of accomplice, even if reasonable and uncontradicted, must be viewed with caution and suspicion); Barnes v. State, 460 So. 2d 126, 131, 133-34 (Miss. 1984)(error to not allow defense to question hostile witness about alleged immunity/leniency agreement; error to exclude prior inconsistent statements of prosecution witness tending to exculpate defendant); McClinton v. State, 459 So. 2d 807, 809 (Miss. 1984)(impermissible reference to polygraph test cured by jury instruction); Ratliff v. State, 459 So. 2d 805, 806 (Miss. 1984)(where all facts are not in evidence, presumption of malice arising from use of deadly weapon not dissipated); Brewer v. State, 459 So. 2d 293, 296 (Miss. 1984)(defendant may be cross-examined if he chooses to testify on his own behalf); Lockett v. State, 459 So. 2d 246, 253 (Miss. 1984)(error to admit evidence of defendant's subsequent crimes); Gibson v. State, 458 So. 2d 1046, 1047 (Miss. 1984)(results of blood test inadmissible where test administered after expiration date on testing kit); Stevens v. State, 458 So. 2d 726, 729-30 (Miss. 1984)(photographs of victim's wounds admissible if not unduly prejudicial); Evans v. State, 457 So. 2d 957, 958 (Miss. 1984)(evidence concerning defendant's behavior within reasonable time prior to homicide held admissible); Taylor v. State, 457 So. 2d 956, 956 (Miss. 1984)(state crime laboratory employee held qualified to testify as expert in rape case; not error to refuse jury inspection of defendant's car); Lee v. State, 457 So. 2d 920, 923-24 (Miss. 1984)(evidence of defendant's flight from scene held admissible); McCormick v. State, 456 So. 2d 764, 766 (Miss. 1984)(testimony concerning identity of handwriting held inadmissible without admission of documents upon which opinion was based); Warren v. State, 456 So. 2d 735, 738 (Miss. 1984)(not error to admit testimony as to identity of voice); Gardner v. State, 455 So. 2d 796, 800 (Miss. 1984)(not error to allow witness to testify by reading notes); Berry v. State, 455 So. 2d 774, 776 (Miss. 1984)(evidence of homicide victim's character held inadmissible unless identity of aggressor is in controversy); Lewis v. State, 454 So. 2d 1306, 1307-08 (Miss. 1984)(jury need not accept sole eyewitness's account of homicide where his testimony is contradicted by credible evidence; not error to admit photograph of victim if relevant and not inordinately gruesome); Stringer v. State, 454 So. 2d 468, 474-75 (Miss. 1984)(evidence of defendant's drug use and refusal to take polygraph test held inadmissible, but admission was harmless error in view of other evidence); Murphy v. State, 453 So. 2d 1290, 1294 (Miss.

discovery,[14] embezzlement,[15] evidentiary hearings,[16] excusable homi-

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1984)(party does not waive right to object to use of hearsay evidence by adducing such evidence himself); Knebel v. City of Biloxi, 453 So. 2d 1037, 1040 (Miss. 1984)(statements made under threat of dismissal, or fruits thereof, held inadmissible); DeBussi v. State, 453 So. 2d 1030, 1031-32 (Miss. 1984)(original judgment must be produced as proof of prior conviction unless statute endowed substituted document with equivalent authority); Ferguson v. State, 452 So. 2d 849, 850 (Miss. 1984)(prior inconsistent statements held admissible only to impeach, not as substantive evidence); Neal v. State, 451 So. 2d 743, 759 (Miss. 1984)(evidence of past prosecutions ending without convictions held admissible where necessary to provide coherent account of transaction in question); Barfield v. State, 451 So. 2d 729, 731 (Miss. 1984)(statements made before preliminary hearing held admissible as prior inconsistent statement for impeachment purposes, though not as evidence of defendant's failure to testify at preliminary hearing); Young v. State, 451 So. 2d 208, 212-13 (Miss. 1984)(error to admit hearsay evidence pertaining to identity of document); Wiley v. State, 449 So. 2d 756, 761-63 (Miss. 1984)(error to allow prosecutor to comment before jury that death sentence can be reviewed); Winters v. State, 449 So. 2d 766, 768 (Miss. 1984)(character evidence must relate to defendant's general reputation rather than reputation for committing the particular crime charged); Collins v. State, 447 So. 2d 645, 646-48 (Miss. 1984)(photographs not inadmissible merely because gruesome; not error to deny motion for new trial due to failure to produce defendant's statement where that statement was neither exculpatory nor inconsistent with other testimony); Sharp v. State, 446 So. 2d 1010, 1011 (Miss. 1984)(evidence of separate offense held admissible where it formed part of *res gestae* of offense charged); Sharp v. State, 446 So. 2d 1008, 1009 (Miss. 1984)(photographs not inadmissible merely because gruesome); Harris v. State, 446 So. 2d 585, 589 (Miss. 1984)(error to admit evidence offered by State where that evidence has been properly requested during discovery but not produced); Lewis v. State, 445 So. 2d 1387, 1388-89 (Miss. 1984)(where defendant gave assumed name to arresting officer before being given *Miranda* warnings, officer's testimony as to name given held admissible); Blair v. State, 445 So. 2d 1373, 1376-77 (Miss. 1984)(error to allow impeachment of witness by irrelevant showing of unchaste behavior); Shelton v. State, 445 So. 2d 844, 848 (Miss. 1984)(evidence of previous similar incidents held admissible in child abuse cases to show continuing pattern of abuse); Williams v. State, 445 So. 2d 798, 812 (Miss. 1984)(error to allow prosecutor to comment before jury that death sentence can be reviewed); Ford v. State, 444 So. 2d 841, 843 (Miss. 1984)(error to admit statement of defendant where substance of statement had been properly requested during discovery but not produced); Pickett v. State, 443 So. 2d 796, 799 (Miss. 1984)(evidence of witness's character for honesty held admissible where such character placed in issue).

[14] Franklin v. State, 460 So. 2d 104, 106 (Miss. 1984)(oral request for discovery insufficient); Shavers v. State, 455 So. 2d 1299, 1301 (Miss. 1984)(identity of rebuttal witnesses must be disclosed under rule 4.07); Downs v. State, 449 So. 2d 783, 785 (Miss. 1984)(discovery proceedings aborted in former action due to defective indictment had no effect on reciprocity requirements in second action based on same incident).

[15] Shelley v. State, 447 So. 2d 124, 126 (Miss. 1984)(failure to perform contract after partial payment not embezzlement).

[16] King v. Thigpen, 446 So. 2d 600, 601-02 (Miss. 1984)(hearing proper to determine whether defendant was denied effective assistance of counsel); Gilliard v. State, 446 So. 2d 590, 593 (Miss. 1984)(evidentiary hearing proper to determine whether confession was voluntary and whether defendant was denied effective assistance of counsel).

cide,[17] expert testimony,[18] courtroom identifications,[19] false pretenses,[20] fines,[21] game and fish,[22] imprisonment for debt,[23] indictments,[24] the rights of indigents,[25] insanity,[26] judgments of acquittal notwithstanding

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[17] Baker v. State, 455 So. 2d 770, 773 (Miss. 1984)(culpable negligence precludes homicide from being classified as excusable as defined by MISS. CODE ANN. § 97-3-17 (1972)).

[18] Billiot v. State, 454 So. 2d 445, 458 (Miss. 1984)(appearance of expert witness without notice to defense not reversible error without showing of surprise or prejudice); Ruffin v. State, 447 So. 2d 113, 118-19 (Miss. 1984)(state not bound to pay for defendant's expert witnesses who counter state's own expert witnesses).

[19] Blanks v. State, 451 So. 2d 775, 777 (Miss. 1984)(courtroom identification invalid for suggestiveness where witness had observed defendant near scene of crime).

[20] Gordon v. State, 458 So. 2d 739, 740 (Miss. 1984)(injury or detriment to victim necessary element of false pretenses); Walley v. State, 458 So. 2d 734, 735 (Miss. 1984)(reliance on misrepresentation of existing fact must be proven).

[21] Lee v. State, 457 So. 2d 920, 924 (Miss. 1984)(legal to fine indigent provided there is no actual incarceration for failure to pay).

[22] Pharr v. State, 465 So. 2d 294, 300-01 (Miss. 1984)(separate instances of "headlighting" deer may be separate charges, although arising from same expedition).

[23] Payne v. State, 462 So. 2d 902, 904-05 (Miss. 1984)(making suspension of sentence contingent upon payment of fine does not constitute imprisonment for debt, though it is reversible as plain error since it contravenes statute).

[24] Joshua v. State, 445 So. 2d 221, 223 (Miss. 1984)(indictment void where it failed to allege overt act towards commission of offense charged); Harris v. State, 445 So. 2d 1369, 1370 (Miss. 1984)(indictment for armed robbery valid where gun used, though no property actually taken); Henderson v. State, 445 So. 2d 1364, 1367-68 (Miss. 1984)(correct grammar not necessary element of valid indictment); Durr v. State, 446 So. 2d 1016, 1017 (Miss. 1984)(indictment void where it failed to allege overt act towards commission of crime charged); Bennett v. State, 451 So. 2d 727, 728 (Miss. 1984)(single indictment may not contain multiple charges); Cumbest v. State, 456 So. 2d 209, 225 (Miss. 1984)(pretrial publicity not grounds for quashing indictment absent showing that grand jury did not act fairly and impartially); Johnson v. State, 452 So. 2d 850, 853 (Miss. 1984)(conviction under invalid indictment can be reversed under plain error rule, despite lack of contemporaneous objection); Jackson v. State, 450 So. 2d 1081, 1082 (Miss. 1984)(where variance between indictment and items of proof is material, items misdescribed in indictment inadmissible); Thames v. State, 454 So. 2d 486, 487 (Miss. 1984)(variance waived if not raised at trial); Lambert v. State, 462 So. 2d 308, 311 (Miss. 1984)(indictment for capital murder must specify underlying felony but need not list its elements); Evans v. State, 460 So. 2d 824, 828 (Miss. 1984)(indictment for possession of marijuana valid though it charged defendant with intent to "transfer" rather than "deliver"); Ward v. State, 461 So. 2d 724, 726 (Miss. 1984)(conviction under multiple-count indictment not reversible where defendant consciously waived any objection to indictment at trial).

[25] Cassibry v. State, 453 So. 2d 1298, 1299 (Miss. 1984)(indigents may not be incarcerated for failure to pay fines).

[26] Billiot v. State, 454 So. 2d 445, 458 (Miss. 1984)(defendant not necessarily incompetent to stand trial, though diagnosed as paranoid schizophrenic); Frost v. State, 453 So. 2d 695, 698 (Miss. 1984)(where insanity defense raised, statements of remorse by

the verdict,[27] juries,[28] jury instructions,[29] jurisdiction,[30] kidnapping,[31]

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defendant admissible as relevant to his capacity for distinguishing right from wrong).

[27] Pharr v. State, 465 So. 2d 294, 301 (Miss. 1984)(motion granted only if court concludes that all evidence, taken in light most favorable to state, could not support reasonable judgment of conviction).

[28] Booker v. State, 449 So. 2d 209, 222 (Miss. 1984)(peremptory challenges to jurors not subject to judicial review); Blanks v. State, 451 So. 2d 775, 777-78 (Miss. 1984)(co-defendants must agree on peremptory challenges; co-defendants allowed no more peremptory challenges than each would have received if tried separately); Dufour v. State, 453 So. 2d 337, 345 (Miss. 1984)(juror's statement of unwillingness to impose death penalty valid grounds for excluding him for cause); Shedwick v. State, 453 So. 2d 686, 689 (Miss. 1984)(not error to submit homicide case to jury where defendant's statement self-contradictory and inconsistent with other evidence, though he was sole eyewitness); Harmon v. State, 453 So. 2d 710, 712 (Miss. 1984)(jury's request for leniency mere surplusage rather than evidence of reasonable doubt); *In re* Hill, 460 So. 2d 792, 798 (Miss. 1984)(use of peremptory challenges to strike blacks from jury not denial of equal protection); Ward v. State, 461 So. 2d 724, 726 (Miss. 1984)(same); Compton v. State, 460 So. 2d 847, 848 (Miss. 1984)(not reversible error for court to remark during voir dire that defendant's attorney was court appointed).

[29] Ruffin v. State, 444 So. 2d 839, 840-41 (Miss. 1984)(error to withhold manslaughter instruction where jury might have found that defendant acted in heat of passion); Girton v. State, 446 So. 2d 570, 575 (Miss. 1984)(not error to give supplementary instruction after jury had retired); Lenoir v. State, 446 So. 2d 1371, 1372 (Miss. 1984)(preferable, but not essential, for instruction on self-defense to state that danger from deceased could have been either apparent or real); Wilcher v. State, 448 So. 2d 927, 938-40 (Miss. 1984)(in capital murder case, court need not instruct jury that aggravating circumstances must outweigh mitigating circumstances beyond reasonable doubt); Young v. State, 451 So. 2d 208, 210 (Miss. 1984)(instruction on alibi defense mandatory where alibi is basis of defendant's case); Scott v. State, 446 So. 2d 580, 583 (Miss. 1984)(supreme court will reverse where jury instructions are in hopeless conflict); Smith v. State, 463 So. 2d 1028, 1030 (Miss. 1984)(error to give inconsistent jury instructions); Haynes v. State, 451 So. 2d 227, 229 (Miss. 1984)(defendant entitled to instruction on self-defense, even without showing that he tried to avoid confrontation); Franklin v. State, 460 So. 2d 104, 106 (Miss. 1984)(not error to give instruction on burglary, though record contained no evidence of breaking and entering); Holliday v. State, 455 So. 2d 750, 752-53 (Miss. 1984)(where state had one strong piece of direct evidence, jury need not be instructed that "beyond reasonable doubt" means "to the exclusion of any hypothesis other than guilt"); Henderson v. State, 453 So. 2d 708, 710 (Miss. 1984)(where evidence entirely circumstantial, jury must be instructed that "beyond reasonable doubt" means "to the exclusion of any hypothesis other than guilt"); Berry v. State, 455 So. 2d 774, 776 (Miss. 1984)(applicability of *Weathersby* rule in homicide case is question of law rather than of fact); Pannell v. State, 455 So. 2d 785, 788 (Miss. 1984)(error to instruct jury on significance of defendant's flight unless circumstances gave it considerable probative value); Bebley v. State, 456 So. 2d 755, 756 (Miss. 1984)(use of certain jury instruction not improper where Mississippi Supreme Court decision criticizing it had not yet been published); Green v. State, 456 So. 2d 757, 758 (Miss. 1984)(decision to grant or withhold cautionary instruction about testimony of accomplice within discretion of trial judge); Evans v. State, 457 So. 2d 957, 958-59 (Miss. 1984)(admission of state's instructions conflicting with Miss. R. Crim. P. not reversible error where no prejudice to defendant re-

mistrials,[32] mitigating circumstances,[33] motions for new trials,[34] possession of marijuana,[35] possession of stolen property,[36] pre-indictments,[37] pre-sentence investigations,[38] right to counsel,[39] effectiveness of counsel,[40] search and seizure,[41] sentencing,[42] self-representation,[43] severance

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sulted); Roberts v. State, 458 So. 2d 719, 721 (Miss. 1984)(where error in one instruction cured by another instruction, no reversible error); Barnes v. State, 457 So. 2d 1347, 1349-50 (Miss. 1984)(error to instruct that defendant may not claim self-defense if she was armed and provoked incident where state had not established time she armed herself); Fairchild v. State, 459 So. 2d 793, 800-02 (Miss. 1984)(error to refuse instruction on simple murder where evidence could have supported conviction for that crime rather than for capital murder; not error to refuse manslaughter instruction where no evidence could have supported finding that defendant acted in heat of passion).

[30] State v. Maples, 445 So. 2d 540, 542 (Miss. 1984)(circuit courts and supreme court have concurrent jurisdiction to set appearance bonds after appeal); Williams v. State, 459 So. 2d 777, 779 (Miss. 1984)(defendant's acceptance of lesser plea of manslaughter does not deprive circuit court of jurisdiction over him, even though he was juvenile); Houston v. State, 461 So. 2d 720, 724 (Miss. 1984)(circuit courts have exclusive jurisdiction over those charged with capital crimes, provided person charged is 13 years of age or older).

[31] Brewer v. State, 459 So. 2d 293, 296 (Miss. 1984)(asportation not essential element of kidnapping).

[32] Payne v. State, 462 So. 2d 902, 904 (Miss. 1984)(not error to refuse request for mistrial due to witness's passing reference to unrelated crime).

[33] Booker v. State, 449 So. 2d 209, 219 (Miss. 1984)(not error to consider only statutory mitigating circumstances where no other mitigating circumstances alleged).

[34] May v. State, 460 So. 2d 778, 781-82 (Miss. 1984)(motion for new trial not granted on appeal unless unconscionable to allow verdict to stand); Pharr v. State, 465 So. 2d 294, 302 (Miss. 1984)(motions for new trial independent of motions for acquittal notwithstanding verdict).

[35] Evans v. State, 460 So. 2d 824, 826-27 (Miss. 1984)(jury may infer actual or constructive possession of marijuana from totality of circumstances).

[36] Thompson v. State, 457 So. 2d 953, 955-56 (Miss. 1984)(possession and actual or constructive knowledge that property is stolen are elements of this crime).

[37] Wilson v. State, 451 So. 2d 718, 722 (Miss. 1984)(no right to counsel at pre-indictment lineups; identification admissible where no significant chance of misidentification, though procedure suggestive).

[38] Johnson v. Thigpen, 449 So. 2d 1207, 1209 (Miss. 1984)(pre-sentencing hearing discretionary for trial court).

[39] Wilson v. State, 451 So. 2d 718, 722 (Miss. 1984)(no right to counsel at pre-indictment lineups); Cannaday v. State, 455 So. 2d 713, 724 (Miss. 1984)(under circumstances of case sub judice, denial of counsel harmless error in guilt phase of bifurcated trial, but reversible error in sentencing phase).

[40] Gilliard v. State, 446 So. 2d 590, 593-94 (Miss. 1984)(petitioner entitled to evidentiary hearing to determine denial of effective assistance of counsel); King v. Thigpen, 446 So. 2d 600, 601-02 (Miss. 1984)(effectiveness of counsel determined via evidentiary hearing); Lambert v. State, 462 So. 2d 308, 316 (Miss. 1984)(no reversal for ineffective assistance of counsel absent showing of "deficiency" of representation); *In re* Hill, 460 So. 2d 792, 801 (Miss. 1984)(to support claim of ineffective assistance of counsel, petitioner

of trials,[44] statutes,[45] suppression hearings,[46] unborn children,[47] venue,[48] waiver of rights,[49] and late appeals.[50] The court also handed down three decisions with unpublished opinions.[51]

II. Objective Standard for Murder/Manslaughter Distinction

In *Taylor v. State*,[52] the Mississippi Supreme Court confronted

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must show deficiency of representation resulting in prejudice to his defense); Ward v. State, 461 So. 2d 724, 727 (Miss. 1984)(even if defendant's counsel ineffective, no prejudice resulted because of overwhelming evidence of defendant's guilt).

[41] Hall v. State, 455 So. 2d 1303, 1307 (Miss. 1984)(search warrant valid where reliable informant and physical evidence supplied probable cause for suspecting presence of narcotics); Ward v. State, 461 So. 2d 724, 726-27 (Miss. 1984)(failure to return search warrant within statutory period does not render search illegal absent some showing of prejudice to defendant; same is true of failure to inventory goods seized).

[42] McLamb v. State, 456 So. 2d 743, 744 (Miss. 1984)(defendant cannot be sentenced under habitual offender statute if his only violent crime is one for which he is currently being tried); Tate v. State, 455 So. 2d 1312, 1313 (Miss. 1984)(where defendant is sentenced for two separate offenses at different terms of court, terms are to be served consecutively).

[43] Johnson v. State, 449 So. 2d 225, 225 (Miss. 1984)(defendant not allowed to alter attorney's brief merely because of dissatisfaction).

[44] Blanks v. State, 451 So. 2d 775, 777 (Miss. 1984)(severance of trials for co-defendants within discretion of trial judge; severance not prejudicial to either defendant where evidence went equally to guilt of both).

[45] Cumbest v. State, 456 So. 2d 209, 222 (Miss. 1984)(where two statutes apply to same offense, state not bound to prosecute under statute providing lesser penalty).

[46] Lee v. State, 457 So. 2d 920, 922-23 (Miss. 1984)(where state produced witnesses at suppression hearing to prove voluntary confession, it was not obliged to produce same witnesses at trial).

[47] State v. Willis, 457 So. 2d 959, 960 (Miss. 1984)(where death of unborn child and mother result from same act, offense of manslaughter for feticide not merged into offense of murder for mother's death).

[48] Fairchild v. State, 459 So. 2d 793, 799 (Miss. 1984)(rebuttable presumption that homicide victim killed in county where body found).

[49] Stevens v. State, 458 So. 2d 726, 728-29 (Miss. 1984)(where defendant was alcoholic of low intelligence and limited education, totality of circumstances must must be examined to determine whether waiver of rights was knowing and intelligent); Jones v. State, 461 So. 2d 686, 701-04 (Miss. 1984)(defendant did not waive right to object to illegally admitted confession by later testifying it was substantially true); Yates v. State, 467 So. 2d 884, 887 (Miss. 1985)(defendant waived objection to inadmissible confession by signing same confession after consultation with attorney).

[50] Williams v. State, 456 So. 2d 1042, 1043 (Miss. 1984)(defendant could perfect late appeal where he missed deadline for appeal of trial court order through no fault of his own).

[51] Majors v. State, 453 So. 2d 693, 693 (Miss. 1984); Jenkins v. State, 456 So. 2d 245, 245 (Miss. 1984); Spurlock v. State, 460 So. 2d 137, 137 (Miss. 1984).

[52] 452 So. 2d 441 (Miss. 1984).

the issue of whether expert psychological testimony relating to a defendant's abnormal mental condition may be introduced into evidence to reduce a charge of murder to manslaughter.[53] This was a question of first impression in Mississippi.[54]

The defendant in *Taylor*, convicted of murder,[55] argued that the trial court erred in excluding the testimony of two psychologists who would have stated that the defendant's mental condition precluded her ability to form malice aforethought,[56] a requisite element of murder under Mississippi law.[57] A conviction for the lesser offense of manslaughter is appropriate where a defendant acted without malice aforethought[58] and on provocation sufficient to arouse the heat of passion in

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[53] *Id.* at 444.

[54] *Cf. id.* at 444-47 (court citing other jurisdictions that had previously considered issue).

[55] *Id.* at 443. Taylor was an unmarried 14-year-old mother of an infant. Pursuant to a court order declaring Taylor unable to care for the infant, Maple Markham, a social worker, removed the infant from Taylor's custody and placed the child in a foster home. Taylor made repeated attempts to gain visiting privileges. After one such attempt, Taylor (who was again pregnant) was driven home by Markham. During the drive, Markham told Taylor that not only would she not be allowed to visit the infant, but also that when the child that Taylor then carried was born, it too would be taken from her. Upon hearing this, Taylor drew a gun and shot and killed Markham. A jury subsequently convicted Taylor of murder and sentenced her to life imprisonment. *Id.*

[56] *Id.* "Malice aforethought" is equivalent to "deliberate design" or "premeditated design." Dye v. State, 127 Miss. 492, 498, 90 So. 180, 181 (1922); Hawthorne v. State, 58 Miss. 778, 783 (1881).

[57] Miss. Code Ann. § 97-3-19 (Supp. 1984) provides, in pertinent part:

> The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:
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> (a) When done with deliberate design to effect the death of the person killed, or of any human being;
>
> (b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual . . . .

Id.

Malice aforethought has been referred to as "the single most important element" of murder. Patterson v. State, 289 So. 2d 685, 687 (Miss. 1974); Pendergraft v. State, 213 So. 2d 560, 564 (Miss. 1968), *appeal dismissed*, 394 U.S. 715, *reh'g denied* 395 U.S. 941 (1969).

[58] *See, e.g.*, Hammock v. State, 379 So. 2d 323, 328 (Miss. 1980)(manslaughter instruction warranted where killing was without deliberation); Clingon v. State, 293 So. 2d 823, 827 (Miss. 1974)(malice aforethought not element of manslaughter), *cert. denied*, 419 U.S. 1047 (1974); Carter v. State, 199 Miss. 871, 879, 25 So. 2d 470, 473 (1946)(element of deliberation absent in manslaughter). Manslaughter is defined as "[t]he killing of a human being without malice, in the heat of passion, but in a cruel and unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense . . . ." Miss. Code Ann. § 97-3-35 (1972).

a reasonable person.[59]

In affirming the exclusion of such expert testimony, the court observed that an objective standard is used to determine the presence *vel non* of malice aforethought. The court ruled that the jury must consider whether a reasonable person in the defendant's position would have been provoked into the passion necessary to reduce the homicide from murder to manslaughter.[60] Therefore, it would not have been proper to admit expert testimony concerning a defendant's mental abnormality.[61] The court reasoned that subjective evidence showing a defendant acted in the heat of passion due to mental abnormality is irrelevant, since the reasonable person to be considered by the jury is, by definition, free from mental abnormalities.[62] Permitting the proffered testimony would have the effect of substituting a subjective standard.[63] The court noted that Mississippi follows the common-law distinction

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[59] *Taylor*, 452 So. 2d at 448. The court discussed three tests for determining whether a homicide should be reduced from murder to manslaughter. *Id.* at 446-47. However, the court relied on a four-element test devised by two well-known commentators: (1) there must have been a reasonable provocation; (2) the defendant must have been in fact provoked; (3) a reasonable man so provoked would not have cooled off in the interval of time between the provocation and the delivery of the fatal blow; and (4) the defendant must not in fact have cooled off during that interval. *Id.* at 447 (quoting W. LAFAVE & A. SCOTT, CRIMINAL LAW 573 (1972)[hereinafter cited as W. LAFAVE & A. SCOTT]).

The court also cited the two-step "English Test" applied in New Jersey: (1) the provocation must be so gross as to cause the ordinary reasonable man to lose his self-control and to use violence with fatal results, and (2) the defendant must in fact have been deprived of his self-control under the stress of such provocation and must have committed the crime while so deprived. *Taylor*, 452 So. 2d at 446 (quoting State v. McAllister, 41 N.J. 342, 196 A.2d 786, 792 (1964)).

[60] *Taylor*, 452 So. 2d at 449. The court held that "[t]he question is an objective one, being whether a reasonable man would have been so provoked." *Id.*

[61] *Id.* The court emphasized that "the issue here is not 'state of mind' but whether the appellant acted in the heat of passion and without malice." *Id.*

[62] *Id.; see also* State v. McAllister, 41 N.J. 342, 354, 196 A.2d 786, 792 (1964)("ordinary man" test, by its very nature, contemplates person without serious mental and emotional defects); Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L.J. 959, 969-70 (1947)(evidence of abnormality inconsistent with objective standard) [hereinafter cited as Weihofen and Overholser]. *But see* Davis v. State, 161 Tenn. 23, 28 S.W. 2d 993, 997 (1930)(evidence of insane delusion admitted); State v. Green, 78 Utah 580, 6 P.2d 177, 184 (1931)(insanity can reduce charge where it renders defendant irresponsible "or partly so"). These cases have been criticized for failing to consider the effect of the holding on the established objective standard. W. LAFAVE & A. SCOTT, *supra* note 59, at 329 n.23.

[63] *See Taylor*, 452 So. 2d at 449 (proffered psychological testimony not relevant because subjective in nature).

between murder and manslaughter,[64] unlike other jurisdictions which separate murder into first and second degrees.[65] While psychiatric testimony is regularly admitted where the complete defense of insanity is raised[66] or where there is some question of whether a defendant has knowingly and intelligently waived rights,[67] the nature of the inquiry in those circumstances is subjective and thus differs from the murder/manslaughter inquiry.[68]

Although psychiatric testimony was admitted into evidence in *Collins v. State*,[69] in which the defendant was convicted of manslaughter rather than murder, that case does not authorize the admission of such evidence where the complete defense of insanity is not raised.[70] In *Collins*, both the insanity defense and the alternative defense of man-

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[64] *See supra* notes 57-58 and accompanying text.

[65] *Taylor*, 452 So. 2d at 449. The court observed: "The question is quite different from the subjective test of premeditation and deliberation which forms the distinction between murder in the first degree and murder in the second degree: a distinction arising solely in modern stautes, not found at common law nor in Mississippi today." *Id.; see also* Weihofen and Overholser, *supra* note 62, at 969 (admitting distinction between criteria for degrees of murder and murder/manslaughter).

MISS. CODE ANN. § 97-3-19 (Supp. 1984) does not separate the crime of murder into degrees. Although it distinguishes between murder and capital murder, the criteria for this distinction are unrelated to the defendant's state of mind.

[66] When insanity is used as the defense, expert opinion testimony as to that ultimate fact in issue is admissible. *See, e.g.*, Alexander v. State, 358 So. 2d 379, 385 (Miss. 1978)(permitting psychiatric testimony related to defendant's sanity); Lewis v. State, 209 Miss. 110, 112, 46 So. 2d 78, 78 (1950)(reversible error to exclude expert testimony concerning defendant's state of mind).

[67] *See, e.g.*, Williamson v. State, 330 So. 2d 272, 275 (Miss. 1976)(permitting testimony concerning defendant's mental capacity at time of waiver); Dover v. State, 227 So. 2d 296, 300 (Miss. 1969)(permitting testimony related to defendant's comprehension of consequences of confession).

[68] *See supra* note 62. Mississippi's version of the insanity defense was set forth in Eatman v. State, 169 Miss. 295, 153 So. 381 (1934), as the "ability of the accused, at the time he committed the act, to realize and appreciate the nature and quality thereof—his ability to distinguish right and wrong." *Id.* at 299, 153 So. at 381. "[T]he defense of insanity raises the broad question of whether or not there is criminal responsibility, a subjective assessment; the distinction between murder and manslaughter is one of degree of responsibility and is objective in nature." *Taylor*, 452 So. 2d at 448.

Inquiries into the voluntariness of confessions are of a different character. In such questions, the issue is "whether the defendant's *will* was overborne at the time he confessed . . . ." Williamson v. State, 330 So. 2d 272, 276 (Miss. 1976)(emphasis added). This analysis is a subjective test without reference to the "reasonable man" standard. *Taylor*, 452 So. 2d at 449.

[69] 361 So. 2d 333, 334 (Miss. 1978).

[70] *Taylor*, 452 So. 2d at 449.

slaughter were raised.[71] Expert opinion testimony relating to the former defense was clearly admissible.[72] The defendant in *Taylor*, however, never pleaded insanity.[73]

Seven other jurisdictions have considered the admissibility of expert opinion evidence, assessing a defendant's capacity to formulate malice aforethought in the murder/manslaughter context.[74] Two of the states admitting such evidence do so on the strength of express statutory mandates.[75] Mississippi has no statute compelling such a result.[76] The California Supreme Court held such testimony admissible to reduce a charge from murder to manslaughter.[77] Its decision can be distinguished, however, on the grounds that California has adopted a distinctive definition of "malice aforethought."[78] The Supreme Court of

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[71] *Collins*, 361 So. 2d at 336-37.

[72] *See supra* note 66 and accompanying text.

[73] *Taylor*, 452 So. 2d at 449.

[74] As the *Taylor* court noted, such evidence was admitted in five of the jurisdictions. *See, e.g.*, People v. Poddar, 10 Cal. 3d 750, 756, 518 P.2d 342, 348, 111 Cal. Rptr. 910, 916 (1974); State v. Santiago, 55 Hawaii 162, 516 P.2d 1256, 1258 (1973); State v. Anderson, 515 S.W.2d 534, 539 (Mo. 1974); Commonwealth v. McCusker, 448 Pa. 382, 292 A.2d 286, 291-93 (1972); State v. Green, 78 Utah 580, 6 P.2d 177, 186 (1931). Such evidence was barred in two of the jurisdictions. *See, e.g.* State v. Gramez, 256 Iowa 134, 126 N.W.2d 285 (1964); State v. McAllister, 41 N.J. 342, 196 A.2d 786, 792 (1964).

[75] *See* HAWAII REV. STAT. ANN. § 704-401 (1976)(evidence of mental disease, disorder or defect admissible whenever relevant to defendant's capacity for forming necessary intent); MO. ANN. STAT. § 552.030.3(1)(Vernon Supp. 1984)(expressly admitting evidence of mental disease or defect).

[76] *Taylor*, 452 So. 2d at 447-48.

[77] *See* People v. Poddar, 10 Cal. 3d 750, 756, 518 P.2d 342, 348, 111 Cal. Rptr. 910, 916 (1974). The California court ruled that "[i]f it is established that the accused, because he suffered a diminished capacity, was unaware of or unable to act in accordance with the law, malice could not be properly found and the maximum offense for which he could be convicted would be voluntary manslaughter." *Id.*

[78] W. LAFAVE & A. SCOTT, *supra* note 59, at 329-30. In People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966), the court ruled that the California Penal Code, § 192, did not require the conclusion that malice could be negated only by the usual provocation formula. Another circumstance could mitigate murder to manslaughter: "[I]f because of mental defect, disease, or intoxication, . . . the defendant is unable to comprehend his duty to govern his actions in accord with the duty imposed by law, he does not act with malice aforethought . . . ." *Conley*, 64 Cal. 2d at 314-17, 411 P.2d at 915-18, 49 Cal. Rptr. at 819-22.

The Mississippi Supreme Court distinguished *Poddar* for this reason and for two others. California's definition of manslaughter contains no requirement that the killing be "in the heat of passion"; it need only be "without malice." CAL. PENAL CODE § 192 (West Supp. 1984), *cited in Taylor*, 452 So. 2d at 448. Further, *Poddar* was rendered when California recognized the defense of limited capacity (later abolished by statute). *See* CAL. PENAL CODE § 28 (West Supp. 1984), *cited in Taylor*, 452 So. 2d at 448.

Utah also held such evidence admissible, but it did not discuss the nature of the distinction in terms of objectivity and subjectivity.[79] The Mississippi Supreme Court paid special attention to the holding of the Pennsylvania Supreme Court in *Commonwealth v. McCusker*.[80] This case announced the rule that expert testimony was admissible in a homicide case if offered to show the defendant's state of mind or his capacity for acting with malice aforethought.[81] The Pennsylvania court arrived at this conclusion even though it affirmed that "the ultimate test for adequate provocation remains whether a reasonable man, confronted with a series of events, became impassioned to the extent that his mind was 'incapable of cool reflection.' "[82]

The Supreme Court of New Jersey reached the opposite result in *State v. McAllister*,[83] a case the Mississippi court found "most instructive."[84] The New Jersey court held that such evidence was incompatible with the objective nature of the murder/manslaughter mitigation test.[85] Iowa reached a similar result on the issue.[86]

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[79] *See* State v. Green, 78 Utah 580, 6 P.2d 177, 186 (1931)(evidence of insanity and heat of passion together sufficient to warrant manslaughter instruction despite fact normal person would not be enraged by facts in record).

[80] 448 Pa. 382, 292 A.2d 286 (1972).

[81] *McCusker*, 292 A.2d at 291-93.

[82] *Id.* at 290. In *Taylor*, Justice Sullivan contended that such a conclusion could be reached only by assuming that "(1) the concept of a reasonable man contemplates a man with mental abnormalities or (2) the ultimate issue was not whether a reasonable man would have been impassioned." *Taylor*, 452 So. 2d at 447. In fact, the *McCusker* court did distinguish between the objective and subjective elements but implicitly denied that the objectivity of the "quantum-of-provocation" inquiry was compromised by subjective evidence relating to the defendant's state of mind. *McCusker*, 292 A.2d at 289-91. The Pennsylvania court has repeatedly expressed its satisfaction that the use of such evidence is fully compatible with the traditional two-step requirement. *See, e.g.*, Commonwealth v. Davis, 462 Pa. 27, 336 A.2d 888, 890 (explaining *McCusker*), *cert. denied*, 423 U.S. 1019 (1975); Commonwealth v. Light, 458 Pa. 328, 326 A.2d 288, 292 (1974)(*McCusker* preserves both objectivity of provocation requirement and subjectivity of state-of-mind element).

Mississippi's court appears less sanguine about the prospects of keeping these two strands of the test intact since "[u]nless it meets the objective standard of reasonableness, the subjective fact of passion does not make the killing manslaughter. Such factors as mental abnormality or intoxication are therefore irrelevant, since the 'reasonable man' standard postulates a sane and sober man." Weihofen and Overholser, *supra* note 62, at 969-70, *quoted in Taylor*, 452 So. 2d at 446-47.

[83] 41 N.J. 342, 196 A.2d 786 (1964).

[84] *Taylor*, 452 So. 2d at 446; *see supra* note 59 and accompanying text.

[85] *McAllister*, 196 A.2d at 792. The New Jersey court reached this conclusion:

> Defendant's proffered thesis would make the criterion entirely a subjective test of the actual effect of the action of the deceased upon the mind of the particular defendant charged with his homicide. The application of the "ordinary

Mississippi's continued adherence to the objective standard for distinguishing murder from manslaughter[87] is theoretically unexceptionable. Certain practical difficulties, however, remain unresolved by the *Taylor* opinion. In cases like *Collins* where the complete defense of insanity is raised,[88] a possible danger exists that the jury could still use that evidence to reduce the crime and convict the defendant of manslaughter. This problem could conceivably be cured by suitable jury instructions. Nonetheless, *Taylor* could result in the increased use of the insanity defense as defense attorneys find other strategies foreclosed.

III. Manslaughter Instruction Mandatory in Capital Murder Cases Where Evidence Warrants

A case with important implications for both substantive law and criminal procedure was *Lanier v. State*,[89] which involved the shooting of a police officer.[90] *Lanier* addressed numerous important constitutional issues including, *inter alia*, the effect of an invalid arrest warrant[91] and the admissibility of an allegedly involuntary confession.[92] Of

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man" test as the objective standard against which to measure the subjective fact of passion makes defendant's suggested individual subjective test inappropriate. Such a norm presupposes an "ordinary man," which expression by its very nature contemplates a person without "serious mental and emotional defects."

Id.

[88] *See* State v. Gramez, 256 Iowa 134, 126 N.W.2d 285, 290 (1964)(insanity acts as complete defense to murder and therefore cannot act as mitigation of offense to manslaughter).

[87] *See supra* notes 60-62 and accompanying text.

[88] *See supra* notes 69-72 and accompanying text.

[89] 450 So. 2d 69 (Miss. 1984).

[90] *Id.* at 71. A Gulfport police officer was found mortally wounded in his patrol car after having radioed for help. A picture of a bicycle found near the scene was televised throughout the community. Two of the defendant's co-workers informed the police that the defendant had ridden the bicycle to work on the day of the shooting, thus implicating him in the crime. *Id.* at 71-72.

[91] *See id.* at 73. The court agreed with the defendant's contention that the arrest warrant was invalid because it was issued by a deputy court clerk who was neither a judge nor a conservator of the peace as required by Miss. Code Ann. §§ 99-15-3 and 99-15-5 (1972). *Lanier*, 450 So. 2d at 73 (citing Martin v. State, 190 Miss. 32, 199 So. 98 (1940) and Porter v. State, 135 Miss. 789, 100 So. 377 (1924)); *see also* Miss. Code Ann. § 9-9-23 (1972)(issuance of arrest warrant is judicial function). Nevertheless, the court held the arrest lawful because it was independently supported by probable cause, relying on United States v. Mahoney, 712 F.2d 956, 960-61 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 3590 (1984) and Powell v. State, 394 So. 2d 326, 327 (Miss. 1981), for the proposition that an arrest is constitutional if based on facts sufficient to establish probable cause,

particular note, however, was the court's treatment of the defendant's contention that he was entitled to an instruction on the lesser included offense of manslaughter. After affirming the trial court's decision regarding the invalid arrest warrant and confession,[93] the court reversed and remanded for a new trial, concluding that the trial court had erroneously refused the manslaughter instruction.[94]

The court reasoned that under the dictates of the United States Supreme Court decisions in *Beck v. Alabama*[95] and *Hopper v. Evans*,[96]

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regardless of the legality of the warrant. *Lanier*, 450 So. 2d at 73. Such facts existed in the case *sub judice* since the officers knew that a homicide had been committed and that belongings of the defendant had been found at the scene. *Id.*; *see* Rome v. State, 348 So. 2d 1026, 1027 (Miss. 1977)(probable cause does not require evidence sufficient to support conviction).

[92] *See Lanier*, 450 So. 2d at 74-79. The defendant alleged that his videotaped confession was inadmissible at trial because it was involuntarily given due to a delay of 50 to 60 hours in bringing him before a magistrate. He also alleged that he had been interrogated after refusing to waive his *Miranda* rights, and that he had confessed as a result of being promised psychiatric help. *Id.* at 74.

The court observed that the voluntariness of a statement was a threshold test for determining admissibility under the fourth and fifth amendments as interpreted by Brown v. Illinois, 422 U.S. 590 (1975), and Hall v. State, 427 So. 2d 957 (Miss. 1983). The court found that Lanier had knowingly and intelligently waived his *Miranda* rights. Moreover, even if it were assumed, *arguendo*, that the arrest was invalid, there was nothing in the record indicating that the confession resulted from an invalid arrest. *Lanier*, 450 So.2d at 75. The court also rejected Lanier's claim that his confession was obtained by a promise of mental health care since the transcript of the interrogation furnished no basis for a conclusion that the offer of help was conditioned on his confession. *Id.* at 75-79.

[93] *Lanier*, 450 So. 2d at 72-75.

[94] *Id.* at 79-81.

[95] 447 U.S. 625 (1980). *Beck* reversed an Alabama defendant's conviction for robbery and intentional killing. Under Alabama law, felony murder is a lesser included offense of this capital crime. *Id.* at 627-28. Alabama's death penalty statute had been construed as denying the jury the option of convicting for the lesser included offense. *Id.* at 628 n.3. Thus, if the jury voted to convict at all, it was bound to impose the death penalty. If this occurred, the trial judge would conduct a hearing to weigh aggravating and mitigating circumstances, after which he could reduce the sentence to life imprisonment without parole. *Id.* at 628-29.

The United States Supreme Court ruled that a defendant's due process rights under the fourteenth amendment required the lesser included offense instruction when the evidence warranted it. *Id.* at 637. The Court stated that where the evidence clearly establishes that a defendant is guilty of a violent offense, but some question remains as to whether all elements of a capital offense are present, the risk of an unjustified conviction would be substantially increased where the jury is given only the choice of a capital offense conviction or acquittal. *Id.* The Court gave special emphasis to the fact that under Alabama's capital offense statutes, the defendant's life was at stake. *Id.*

[96] 456 U.S. 605 (1982). In *Hopper*, the Supreme Court reversed a decision of the

as well as its own decision in *Jackson v. State*,[97] a manslaughter instruction was required where the evidence warranted such.[98] The central question in determining whether the evidence in the instant case required a manslaughter instruction was who fired the first shot. The court stated that the evidence warranted a manslaughter instruction for two reasons: first, the only proof of who fired first was the defen-

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United States Court of Appeals for the Fifth Circuit which held that where a lesser included instruction was not given in a capital case, a conviction must be overturned and the defendant retried. *Id.* at 610. The Fifth Circuit relied on *Beck* to hold that an Alabama statute barring the lesser included instruction in capital cases so tainted the defendant's trial that his conviction must be reversed. *Id.* at 610. The defendant in *Hopper*, unlike the defendant in *Beck*, testified at trial that he intentionally shot his victim in the back during a robbery, that he had "no intention whatsoever of ever reforming in any way" and would return to a life of crime if released. *Id.* at 607. In reinstating Hopper's conviction, the Supreme Court emphasized that *Beck* required the giving of a lesser included offense instruction in capital cases only when there was evidence which, if believed, could reasonably have led to conviction for a lesser offense. *Id.* at 610. The Fifth Circuit misinterpreted *Beck* in holding that the Alabama statute was a "brooding presence" infecting every aspect of a capital defendant's trial. Thus, a lesser included offense instruction is not required in every case, but only where the evidence would have supported it. *Id.* at 610-11.

The *Hopper* Court found further support in *Roberts v. Louisiana*, 428 U.S. 325, *reh'g denied*, 429 U.S. 890 (1976). In *Roberts*, a plurality opinion invalidated a Louisiana procedure permitting a jury to return a verdict of manslaughter or second-degree murder even though there was no evidence to support a conviction for the lesser offense. The Supreme Court held this practice impermissible because it "invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate." *Id.* at 334-35.

In *Hopper*, the Supreme Court concluded that an instruction on the lesser offense was not warranted because the evidence clearly proved that the defendant "intended to kill the victim, [and] affirmatively negated any claim that he did not intend to kill the victim." *Hopper*, 456 U.S. at 613.

In *Lanier*, the state noted that there was no evidence that the officer was not killed while acting in his official capacity or that the defendant did not know the victim was an officer. Thus, the state contended that there was no evidence warranting an instruction on the lesser included offense. *Lanier*, 450 So. 2d at 80. The state relied on Bell v. Watkins, 692 F.2d 999, 1004-05 (5th Cir. 1982), *cert. denied sub nom.* Bell v. Thigpen, 104 S. Ct. 142 (1983), which held that where evidence clearly established that a murder was committed during a robbery, no lesser instruction was to be given. The Mississippi Supreme Court rejected this analogy to the felony murder doctrine, finding *Bell* inapposite since the *Bell* court was clearly dealing with a statute which, unlike the one controlling the instant case, specified an underlying felony. *Lanier*, 450 So. 2d at 80.

[97] 337 So. 2d 1242 (Miss. 1976). In *Jackson*, the court invalidated MISS. CODE ANN. § 99-17-20 (1972) to the extent that the statute prohibited the giving of instructions on lesser included offenses in capital cases. The court emphasized, though, that such instructions should not be "indiscriminately or automatically given, as was condemned in *Roberts*." *Jackson*, 337 So. 2d at 1255.

[98] *Lanier*, 450 So. 2d at 79-81.

dant's testimony; second, the defendant's testimony was corroborated by the three empty cartridge shells found in the officer's revolver and by a chemical analysis of the officer's hand which indicated that he had recently fired his handgun.[99] The court rejected the argument that a trained marksman would be highly unlikely to miss his target three times in a row at a range of approximately four feet unless he was already wounded. Such evidence raised factual questions properly resolved by the factfinder, not by an appellate court.[100]

The court summarily dismissed the prosecution's claim that since the two statutorily defined elements of capital murder had been proved by the defendant's confession, he was not entitled to a manslaughter instruction.[101]

Justice Bowling argued in a vigorous dissent[102] that although he agreed with the holdings in *Beck* and *Hopper*, the evidence in this case did not warrant an instruction for a lesser included offense. Rather, it clearly showed that the defendant had killed "a police officer, acting in his official capacity, with the knowledge that the victim was a peace officer." Accordingly, the jury could not rationally have found the defendant guilty of a lesser offense.[103] Justice Bowling also contended that the defendant's proposed jury instruction was properly denied because it failed to specify essential elements of the crime of manslaughter.[104]

Lanier should have a salutary effect on Mississippi criminal trials and will enhance the rights of defendants. A contrary holding might have resulted in the imposition of unduly harsh verdicts by juries which were uninformed of their options. The rule of *Lanier* will enable juries to return verdicts which more accurately reflect a defendant's culpability.

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[99] *Id.* at 80.

[100] *Id.*

[101] *Id.* The pertinent section of the statute states:

> The killing of a human being without the authority of law . . . shall be capital murder in the following cases: (a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity, and with knowledge that the victim was a peace officer or fireman.

MISS. CODE ANN. § 97-3-19(2) (Supp. 1982).

[102] *Lanier*, 450 So. 2d at 81-85 (Bowling, J., dissenting). The dissent was joined by Justices Walker and Roy Noble Lee.

[103] *Id.* at 81 (Bowling, J., dissenting).

[104] *Id.* at 82-83 (Bowling, J., dissenting). Specifically, there was no allegation that the defendant acted "without malice and in the heat of passion." *Id.* at 83.

IV. Adjustment of Resistance Requirement in Rape Cases

In 1984, the Mississippi Supreme Court handed down several decisions dealing with the crime of rape. Of particular significance were *Christian v. State*[105] and *Clemons v. State*,[106] both of which addressed the traditional "resistance requirement" for a rape conviction. *Christian* involved the sexual assault of a seventeen-year-old woman by a twenty-three-year-old male.[107] Defendant Christian admitted having sexual intercourse with the girl on the night in question, but raised the defense of consent.[108] The prosecutrix bore no signs of physical injury and Christian had not displayed a deadly weapon.[109] The prosecutrix testified that she submitted to Christian's advances because she feared that he would kill her if she resisted. She explained that this fear had arisen because of Christian's statement that he had a gun and had already killed two other people, and from the fact that he was bigger and stronger than she.[110] Christian was convicted and sentenced to thirty-five years imprisonment.[111] On appeal, he argued, *inter alia*, that the trial court had wrongly refused his jury instruction stating that an alleged rape victim must use every resource to combat her attacker, and that a tactical surrender to an assumed superior force does not suffice to satisfy that resistance requirement.[112]

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[105] 456 So. 2d 729 (Miss. 1984).

[106] 460 So. 2d 835 (Miss. 1984).

[107] *Christian*, 456 So. 2d at 730.

[108] *Id.* at 730. The prosecutrix charged that Christian blocked a narrow road on which she was driving and forced her to stop. She alleged that he then compelled her to drive him down a lonely country road, where he proceeded to force himself upon her. Christian, on the other hand, argued that he and the prosecutrix had been seeing one another for some time and that the sexual activity was part of a rendezvous. *Id.* at 730-31.

[109] *Id.* at 733.

[110] *Id.* at 731.

[111] *Id.* at 730. The case was tried to the jury in the Circuit Court of Bolivar County, which found Christian guilty of violating Miss. Code Ann. § 97-3-65(2)(Supp. 1983). After the jury was unable to agree on the appropriate punishment, the court imposed a prison term of 35 years. *Christian*, 456 So. 2d at 730.

[112] *Christian*, 456 So. 2d at 733. Specifically, the excluded instruction stated the following:

> The court instructs the jury that a mere tactical surrender by an alleged rape victim in the face of an assumed superior force is not enough. The complaining witness must resist with all physical resources reasonably available to her under the existing circumstances.
>
> Thus, if you find from the evidence in this case that the complaining witness . . . did not resist with all physical resources reasonably available to her in the existing circumstances, you shall find the defendant not guilty.

At common law, rape consisted of the "unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will."[113] Statutes have modified this definition in some particulars, but in general the common-law contours of the offense have been retained.[114] Since the language of the various statutes tends to be general, the courts must determine under what circumstances intercourse was "forcible" or "against the will" of the prosecutrix.

Until recently, alleged rape victims were confronted with a series of formidable obstacles.[115] There was a general consensus that stringent standards must be applied to forestall a plethora of false rape accusations.[116] Early decisions sometimes spoke of the woman's duty to

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Id.

The court instead granted the following instruction:

> The court instructs the jury that while the victim of a rape has a duty to use all reasonable physical resistance available to her, under the circumstances then and there existing, to prevent from [sic] being raped, physical resistance on the part of the victim is not necessary if the proof shows beyond a reasonable doubt that she surrendered because of fear arising out of a reasonable apprehension of death or great bodily harm.

Id.

[113] 3 E. Coke, Institutes of the Laws of England 60.

[114] Mississippi's statute, for example, provides in pertinent part that "[e]very person who shall forcibly ravish any female of the age of twelve (12) years or upward . . . upon conviction shall be imprisoned for life." Miss. Code Ann. § 97-3-65 (Supp. 1984). Other statutes refer to sexual intercourse "against a person's will by means of force or fear of immediate and unlawful bodily injury," Cal. Penal Code § 261.2 (West Supp. 1984); "by use of force or threat of force," Ill. Ann. Stat. ch. 38, § 12-13(1)(Smith-Hurd 1984 Supp.); "by force and against his [sic] will," Mass. Gen. Laws Ann. ch. 265, § 22 (West Supp. 1970-83); or under "[c]ircumstances existing at the time of the act [which] cause the complainant to have a reasonable fear of imminent great bodily harm," Minn. Stat. Ann. § 609.342(c)(West Supp. 1984); "by the use of forcible compulsion," Mo. Ann. Stat. § 566.030.1 (Vernon Supp. 1984); by "physical force or coercion," N.J. Stat. Ann. § 2C:14-2c(1)(West Supp. 1984-85); by "[f]orcible compulsion," N.Y. Penal Law § 130.00.8 (McKinney Supp. 1975-84); and "without that person's consent," Tex. Penal Code Ann. § 22.011 (Vernon Supp. 1984). Some statutes specify in detail the amount of resistance necessary by stating, for example, that physical resistance is not required to show that the intercourse was "by force or against the will." *E.g.*, Iowa Code Ann. § 709.5 (West 1979).

[115] A good summary of the requirements of force, resistance and evidence of past chastity can be found in Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. Chi. L. Rev. 613 (1976).

[116] The most famous expression of this attitude was the celebrated dictum of Lord Hale, which has formed the basis of many jury instructions: "It is true rape is a most detestable crime . . . but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 M. Hale, The History of the Pleas of the Crown 635 (1971 ed.). In more recent years, this outlook was echoed by a prominent New York trial judge who

resist "to the utmost," or words to that effect.[117] In a parallel line of

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asserted that "far too many men have been railroaded on sex offense charges." Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROBS. 217, 223 (1960). Also noteworthy is this extended barrage from Dean Wigmore:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.

3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 736 (Chadbourn rev. 1970).

The assumptions underlying these positions have been severely criticized in recent years. The idea that women are eager to fabricate spurious rape claims is undermined by evidence that rape is, in fact, a remarkably under-reported crime. One commentator made this observation: "In light of the time, trauma, and humiliation involved in a rape trial, common sense alone would cast doubt on the validity of these suppositions. Empirical data supports the hypothesis, demonstrating that only a minute percentage of rape reports made to the police are in fact false." Comment, *supra* note 115, at 626. In disapproving the Hale instruction for future use, the California Supreme Court remarked that "[t]he low rate of conviction of those accused of rape and other sexual offenses does not appear to be attributable to a high incidence of unwarranted accusations. Rape in particular has been shown by repeated studies to be grossly under-reported . . . . Those victims with the pluck [to press charges] discover the utter fallaciousness of the conventional wisdom that rape is a charge easily made." People v. Rincon-Pineda, 14 Cal. 3d 864, 880-81, 538 P.2d 247, 258-59, 123 Cal. Rptr. 119, 130-31 (1975). For similar criticisms, see, e.g., Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 21 (1977)(accusing Wigmore of "lending to atavistic suspicion the imprimatur of 'science' and 'reason' "); Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A.L. REV. 567, 582 (1983)(discussing the "unfortunate compendium of misconceptions about men, women, and rape"); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 931 (1973)(questioning "basic assumptions that many women are either amoral or hostile to men").

[117] In an early New York case, the court remarked that "any fact tending to the inference that there was not the utmost in resistance is always received . . . . A mixed case will not do; the connection must be absolutely against the will." People v. Abbot, 19 Wend. 192, 194-195 (N.Y. Sup. Ct. 1838). Other courts have applied an extremely rigoristic interpretation of the resistance requirement. In one case, a trial judge refused a defense instruction that "voluntary submission by the woman while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape." The Nebraska Supreme Court reversed. Reynolds v. State, 27 Neb. 90, 42 N.W. 903, 904 (1889), *overruled on other grounds*, Fulton v. State, 163 Neb. 759,

authority, however, the resistance requirement was mitigated by the realization that a woman might as legitimately yield to the threat of force as to its actual application.[118] In most jurisdictions, some form of the second approach has now supplanted the first.[119]

Mississippi case law on the resistance requirement is sparse. The 1893 case of *Monroe v. State*[120] contained a grandiloquent statement

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81 N.W. 2d 177, 179 (1957). A still more extreme example was provided by a Texas court which held that "every exertion in her power under the circumstances must be made . . . or consent will be presumed . . . . Although some force be used, yet if she does not put forth all the power of resistance which she was capable of exerting under the circumstances, it will not be rape." Perez v. State, 50 Tex. Crim. 34, 94 S.W. 1036, 1038 (1906). In *Perez*, testimony that the defendant had brandished a pistol and dragged the prosecutrix into the woods was deemed insufficient: "A virtuous woman . . . would naturally be expected to exercise more force in opposition to the alleged outrage than is manifested . . . in this record." *Perez*, 94 S.W. at 1038.

[118] In a leading English case, the prosecutrix alleged that she had been assailed by eight men. Justice Coleridge charged the jury that "it is well worthy of your consideration whether, although she at first objected, she might not afterwards (on finding that the prisoners were determined) have yielded to them, and in some degree consented." Regina v. Hallett, 9 Car. & P. 748, 751, 173 Eng. Rep. 1036, 1038 (N.P. 1841). But he then softened the charge by adding that if "non-resistance proceeded merely from being overpowered . . . or that from the number of the prisoners she considered resistance dangerous and absolutely useless, the full charge is made out." *Id.* New York's highest court recognized the merit of this doctrine. It repeated Coleridge's language about cases in which resistance must be "dangerous and absolutely useless" and held that a woman has only the duty to resist to "the extent of her ability on that occasion." People v. Dohring, 59 N.Y. (14 Sickels) 374, 382-84 (1874).

[119] *See, e.g.*, Jenkins v. State, 267 Ind. 543, 372 N.E. 2d 166, 167 (1978)(must resist "to a degree which would indicate that the act is against her will"; not necessarily physical resistance); State v. Barteau, 571 S.W. 2d 483, 484 (Mo. Ct. App. 1978)(Missouri retains "utmost resistance" standard, but will not apply it where victim is "put in fear of personal violence"); State v. Higley, 621 P. 2d 1043, 1054 (Mont. 1980)(victim "need only resist to the extent that it is reasonable"); State v. Pankey, 202 Neb. 595, 276 N.W. 2d 233, 234-35 (1979)(resistance not required where it would be "useless, fruitless, or foolhardy"); People v. Dorsey, 104 Misc. 2d 963, 429 N.Y.S. 2d 828, 833-34 (N.Y. Sup. Ct. 1980)(victim outweighed by 70 pounds, trapped in stalled elevator with assailant; "total compliance" only reasonable response); State v. Carvalho, 122 R.I. 461, 409 A.2d 132, 135-36 (1979)(victim not required to engage in heroics); State v. Horne, 12 Utah 2d 162, 364 P.2d 109, 111-12 (1961)(doctrine of utmost resistance "obsolete"); Hough v. State, 70 Wis. 2d 807, 235 N.W.2d 534, 536 (1975)("law does not require a woman to become a martyr to test by resistance the sincerity of a threat"). *But see* Goldberg v. State, 41 Md. App. 58, 395 A.2d 1213, 1219-20 (1979)(victim must offer physical resistance to limit of ability; fear due to disparity in size not enough); *cf.* State v. Hamm, 577 S.W. 2d 936, 939 (Mo. Ct. App. 1979)(victim must use "utmost resistance of which she is capable"; defendant must have exercised such force as would have "at all hazards" overcome victim's resistance).

[120] 71 Miss. 196, 13 So. 884 (1893).

on the danger of unfounded rape claims,[121] but offered little from which a definite standard of resistance could be deduced.[122] For the next thirty years, little more was heard on the subject,[123] until in 1926 the court stated, in *Milton v. State*,[124] that a prosecutrix was not required to physically resist an attacker who had displayed a deadly weapon, since she yielded only because she was "put in fear."[125] With *Milton*, Mississippi seemed to edge toward liberalization of the resistance requirement. In reality, the standard was still unsettled, a fact underscored nineteen years later by dicta in *Wright v. State*.[126] At the end of the 1940's the court decided two cases further illustrating the tensions within the existing formulae. An unambiguous threat of violence relieved the victim of any duty to resist,[127] but a woman who made a "mere tactical surrender in the face of an assumed superior force" would be held to have consented.[128]

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[121] "Such is the gallantry of our people and their jealous regard for the honor of women, and their universal readiness to protect them and to avenge their wrongs, and especially the most outrageous which can be done one . . . that there is danger that sentiment may mislead juries, and triumph over right and justice . . . ." *Id.* at 201, 13 So. at 885.

[122] The court attached some importance to the fact that "there was a horn at hand, the blowing of which was a signal of something unusual having occurred at the house, [which] was not blown for this unusual (?) occurrence." *Id.* at 199, 13 So. at 884.

[123] In one instance, the court found evidence of resistance too scanty to support a conviction, but in that case there was a discrepancy in the prosecutrix' story. She claimed to have cut the defendant, but there was apparently no sign of a wound. Tynes v. State, 29 So. 91, 91 (Miss. 1901).

[124] 142 Miss. 364, 107 So. 423 (1926).

[125] *Id.* at 368, 107 So. at 423.

[126] 198 Miss. 211, 22 So. 2d 1 (1945). This case involved a prosecutrix who alleged that she was attacked on a public street and dragged into an alley by her assailant. The accused had recently received a medical discharge from the army and weighed some ten pounds less than his alleged victim. The majority found that the defendant's confession had been involuntary, and reversed on those grounds without reaching the resistance issue. *Id.* at 217, 22 So. 2d at 1. One justice, however, issued a separate opinion discussing the merits of the rape charge at some length. After reviewing the peculiar facts of the case he expressed disbelief that the defendant could have achieved the feats ascribed to him if the prosecutrix had "exerted the efforts which the law and decent society requires [sic]." *Id.* at 229, 22 So. 2d at 6 (Griffith, J., dissenting in part). The justice appended a puzzling discussion in which he asserted that the "utmost or most vehement resistance" standard had been definitively rejected, but he then praised the 1906 case of Perez v. State, 50 Tex. Crim. 34, 94 S.W. 1036 (1906), which had particularly enshrined it. *Wright*, 198 Miss. at 230, 22 So. 2d at 6 (Griffith, J., dissenting in part).

[127] McGee v. State, 40 So. 2d 160, *cert. denied*, 338 U.S. 805 (1949). The assailant brandished a knife and threatened to kill both the victim and her small child. The court had little difficulty in finding that her "consent" had been vitiated. *Id.* at 171.

[128] Moss v. State, 208 Miss. 531, 536, 45 So. 2d 125, 126 (1950). This case involved a

In 1974, the resistance requirement was again adjusted by two cases holding that a woman was not required to offer physical resistance if she was placed in "reasonable apprehension of great bodily harm."[129] The court perceived no inconsistency between the tactical surrender language of *Moss v. State*[130] and the "reasonable apprehension" standard of *Fields v. State*.[131] During the late 1970's, the latter language was more often employed,[132] but not without occasional indications that the court regarded the "reasonable apprehension" standard as incorporating rather than opposing the rule of *Moss*.[133]

In the *Christian* case, the court admitted that the "tactical surrender" language of *Moss* was still the law, but insisted that it be read in the light of the "reasonable apprehension" standard of *Fields* and its progeny.[134] The appellant clearly hoped that the absence of any signs of struggle, together with the fact that no weapon had been produced, would lead the court to conclude that the alleged victim's submission had been a "mere tactical surrender."[135] This the court declined to do, although the opinion seems to imply that Christian would have been

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party at which everyone present drank to excess. After the prosecutrix' husband lapsed into unconsciousness, the defendant demanded that she submit to him lest he kill both of them and "tear up the house." The court, after asserting (without citing authority) that it had "repeatedly held that a mere tactical surrender in the face of an assumed superior force is not enough," expressed doubt that more was involved here, since Moss "had at immediate hand no means of carrying out his threat, save by his superior strength." Moss' companion, who had "theretofore shown himself capable by prowess and predisposition" of lending assistance to such a project, was nearby; however, even the companion's presence did not "necessarily make the danger imminent." Nonetheless, the conviction was affirmed because Moss had administered a "substance or liquid [producing] such . . . weakness of body as to prevent effectual resistance," and this, by statute, had vitiated any consent. *Id.* at 536-37, 45 So. 2d at 126-27.

[129] *See* Rush v. State, 301 So. 2d 297, 299 (Miss. 1974)(choke hold sufficed to put victim in "reasonable apprehension of great bodily harm"); Fields v. State, 293 So. 2d 430, 432 (Miss. 1974)(verbal threats, together with possession and firing of guns, sufficed to create "reasonable apprehension").

[130] 208 Miss. 531, 45 So. 2d 125 (1950).

[131] 293 So. 2d 430 (Miss. 1974).

[132] *See, e.g.*, Davis v. State, 406 So. 2d 794, 801 (Miss. 1981)(victim pushed to floor, resulting in "reasonable apprehension"); Lee v. State, 322 So. 2d 751, 752-53 (Miss. 1975)(display of deadly weapon created "reasonable apprehension").

[133] *See* McQueen v. State, 423 So. 2d 800, 803 (Miss. 1982)(intense fear of defendant alone in car with victim on country road not enough in absence of weapons or physical injury); Bishop v. State, 370 So. 2d 238, 239 (Miss. 1979)(defendant, alone in house with prosecutrix, stepped toward her after demanding intercourse; no "reasonable apprehension" in absence of "bruises or marks of violence").

[134] *Christian*, 456 So. 2d at 733.

[135] *Id.*

entitled to an instruction containing the *Moss* phraseology had he not omitted all reference to the *Fields* standard from the instruction he submitted.[136] The court dealt summarily with Christian's other assignments of error and affirmed his conviction.[137]

In *Clemons*, the court attempted to resolve the tension among precedents on the resistance requirement. Defendant Clemons argued that the absence of physical injuries to his victim proved that there could have been no "reasonable apprehension of bodily harm," and that the evidence was thus insufficient to support his conviction.[138] The court disagreed in language clearly indicating that threats alone may avail to satisfy the *Fields* standard.[139]

Christian and *Clemons* are praiseworthy insofar as they preclude the use of the resistance requirement against victims who yield in the face of unmistakable threats. In other respects, however, these decisions are somewhat disconcerting. The court apparently rejected the clear opportunity afforded by these cases to repudiate the "mere tactical surrender" language—language which seems a relic of a less informed and less sensitive age. The *Moss* decision remains embedded in our law, though the assumptions undergirding it have been largely dis-

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[136] *See id.* (instruction based on *Moss* denied for failure to include "reasonable apprehension" language).

[137] *Id.* at 733-35.

[138] *Clemons*, 460 So. 2d at 837-38. In this case, prosecutrix and her two daughters were asleep in their house. The prosecutrix' husband was away on a fishing trip. She awoke to find defendant standing at the foot of the bed. Defendant closed the door to the room and told her to obey him or he would hurt her. She testified that when she attempted to resist defendant applied pressure to her neck. She then submitted for fear that he would kill her and her children. After the incident, no bruises or other signs of violence could be found upon her. Defendant was convicted of rape in the Circuit Court of Neshoba County. *Id.* at 836-37.

[139] *See id.* at 838. Justice Prather, writing for the court explained:

> This Court interprets the . . . decisions to mean that the presence of [sic] absence of threats by the defendant is a factor of equal importance with the presence or absence of bruises or . . . of a deadly weapon. Where, as in *Bishop* and *McQueen*, the evidence of threats is absent or slight and there is no evidence of physical injury or use of a weapon, doubt may exist as to the reasonableness of the victim's apprehension of great bodily harm.

Id.

Christian and Davis v. State, 406 So. 2d 794 (Miss. 1981), were distinguished from *Bishop* and *McQueen* because the records in the former contained "explicit threats of harm" by the defendants. *Id.* In fact, the opinion in *Christian* placed no particular emphasis on the threats, mentioning them only in passing during the account of the facts. *Christian*, 456 So. 2d at 730-31. Nor did the court confront the common-sense view that an unexpected demand for sexual intercourse is inherently threatening.

credited,[140] and though a woman who acts in accordance with its dictates might endanger her life.[141] Moreover, the law has removed a major policy reason supporting decisions like *Moss*—the status of rape as a capital crime.[142] The "reasonable apprehension" standard of *Fields* will doubtless place some limits on the ill effects of *Moss*; nonetheless, "[w]e have scotch'd the snake, not kill'd it."[143] It is to be regretted that the court did not take this opportunity to overrule *Moss* outright and interpret the "reasonable apprehension" requirement with an eye to the totality of the victim's circumstances, as other states have done.[144] As it is, the criminal law of Mississippi is still haunted by the paleolithic notion that a woman who declines to undertake a senseless struggle against hopeless odds has, in some sense, consented to her own violation.

V. Evidence

Among the many decisions of the Mississippi Supreme Court addressing the law of evidence as it relates to criminal law and procedure, two are likely to be of greater than usual importance.

A. Use Of Hypnosis-Related Testimony

Early in its term, the court embarked for the first time on an extended discussion of the relationship of hypnosis to the law of evidence. In *House v. State*,[145] the justices were called upon to decide (1)

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[140] *See supra* note 116.

[141] *See, e.g.*, Schwartz, *supra* note 116, at 576-77 (research indicates that victims who fight "their assailants have a greater chance of suffering serious bodily injury than those who" submit); *see also Queen's Bench Foundation, Rape Prevention and Resistance* 80 (1976)(resistance by fighting often serves only to inflame attacker).

[142] The *Moss* court emphasized the fact that the defendant's life was at stake: "[w]here the penalty for the defendant may be supreme, so must resistance be unto the uttermost." *Moss*, 208 Miss. at 536, 45 So. 2d at 126. The United States Supreme Court has since ruled that the states may not impose the death penalty for rape of an adult woman. Coker v. Georgia, 433 U.S. 584, 592 (1977)(death penalty is so "disproportionate" to crime of rape as to constitute cruel and unusual punishment).

[143] W. Shakespeare, Macbeth, III, ii, 13.

[144] *See supra* note 119 and accompanying text.

[145] 445 So. 2d 815 (Miss. 1984). In *House*, the defendant was indicted, tried and convicted in the Circuit Court of Harrison County for unnatural intercourse with an eight-year-old girl known in the record as "M.P." Such acts were proscribed by Miss. Code Ann. § 97-29-59 (1972). Not surprisingly, there were no witnesses to the incident except the defendant and M.P. herself. In the absence of any corroborative evidence, the state relied heavily on the testimony of Dr. Joseph Tramontana. The opinion contained no account of Tramontana's credentials, but simply described him as a clinical psycholo-

whether Tramontana, a hypnotist, could be allowed to testify as to the content of utterances made by his subject while under a trance induced by the hypnotist; (2) whether the hypnotist could be allowed to offer an opinion as to the veracity of such statements; and (3) whether the testimony of a witness whose memory has been refreshed by hypnotism is admissible. All three questions presented issues of first impression in Mississippi.[146]

1. Admissibility Of Hypnotist's Account

Since the unsworn statements of the prosecutrix, M.P., as received from the lips of the hypnotist, were made out of court and were obviously being offered for the truth of the matter asserted therein, they were hearsay and were inadmissible unless they could be brought within some recognized exception to the hearsay rule.[147] The court, *sua sponte*, examined the only exceptions which seemed likely candidates.[148] Mississippi admits hearsay testimony consisting of statements made to a doctor in order to procure proper medical diagnosis and treatment.[149] In the case *sub judice*, however, the court observed that

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gist and hypnotist. On several occasions Tramontana hypnotized M.P. and asked her to describe her experiences. His testimony as to the substance of her statements, along with his opinion that she was telling the truth, was admitted over defense objections. M.P. herself also testified at the trial. *House*, 445 So. 2d at 817-23.

[146] *House*, 445 So. 2d at 817-18. The use of hypnotism by law enforcement agencies in the state has been noted in passing. *See, e.g.*, Depreo v. State, 407 So. 2d 102, 107 (Miss. 1981)(minor subjected to hypnotism in course of police investigation). Hypnotism has attracted the notice of another branch of Mississippi's government. The attorney general's office, in reply to an inquiry from a municipal official, offered this jaundiced view: "As a device for ferreting out facts, there is nothing inherently illegal about it. The only true yardstick of the utility of an investigative technique, however, is its ability to discover evidence admissible in a court of law. When measured by that standard, hypnosis does not fair well at all." Letter from J. Stephen Wright, Special Assistant Attorney General, to W.E. Felts, City Clerk of Indianola, Mississippi (March 7, 1980).

[147] *House*, 445 So. 2d at 821.

[148] *Id.* At trial, the defense objection to Tramontana's testimony was not based specifically on the hearsay rule. The state argued that the issue was thus procedurally barred on appeal. The court disagreed, citing Loeffler v. State, 396 So. 2d 18, 18 (Miss. 1981), for the proposition that "where an objection is made and where the basis therefor is obvious from the context, little of value is accomplished by insistence on a technically correct objection." *House*, 445 So. 2d at 819. This, together with the perceived need for guidance for trial courts and the comprehensiveness of the briefs in this case, led the court to conclude that the issue could be reviewed under MISS. SUP. CT. R. 6(b), the "plain error" rule. *House*, 445 So. 2d at 819-20.

[149] *See, e.g.*, Fondren v. Durfee, 39 Miss. 324, 326 (1860)(patient's statement of chest pain admissible as hearsay exception).

while under hypnosis, M.P. had not been conscious, a fact which deprived her statement of an important indication of trustworthiness.[150] Moreover, the few other jurisdictions that have considered the matter have held that testimony as to the substance of remarks made by a person under hypnosis is inadmissible hearsay and an improper attempt to bolster the witness' testimony.[151]

2. Hypnotist's Opinion Of His Subject's Veracity

It is commonplace that an ordinary or lay witness may give opinion testimony only about matters of which he has first-hand knowledge[152] or about certain matters generally considered within the public's range of competence.[153] Tramontana's opinion could therefore be admissible only if the proponent could qualify him as an expert. The success of the proponent in that endeavor would depend on the status of hypnotism as an artistic or scientific discipline.[154]

The law's first brush with the hypnotist's art[155] occurred just

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[150] *House*, 445 So. 2d at 821. The requirement of consciousness in the patient is a corollary of the rationale supporting the medical exception. The reliability of such statements is said to be "assured by the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the accuracy of the information he provides the physician." C. McCormick, McCormick on Evidence § 292, at 839 (E. Cleary 3d ed. 1984). For obvious reasons, this logic can have no application to an unconscious declarant.

[151] *House*, 445 So. 2d at 821. *See, e.g.*, State v. Conley, 6 Kan. App. 2d 280, 627 P.2d 1174, 1178 (1981)(hypnotist's testimony as to substance of statement by hypnotized declarant inadmissible hearsay); Rodriguez v. State, 327 So. 2d 903, 904 (Fla. Dist. Ct. App. 1976)(not error to exclude testimony as to defendant's statement made under hypnosis); State v. Harris, 241 Or. 224, 405 P.2d 492, 498 (1965)(doctor cannot testify as to hypnotic or post-hypnotic statements of subject). *But cf.* Jones v. State, 542 P.2d 1316, 1326-27 (Okla. Crim. App. 1975)(hypnotist permitted to testify as to general conformity of defendant's trial testimony with previous statement given under hypnosis, provided he did not describe any specific utterances).

[152] C. McCormick, *supra* note 150, §§ 10-11; *see also* Gray & Hammond, *Opinion and Expert Testimony*, 49 Miss. L.J. 1, 3-4 (1978)(describing trend toward liberal admission policy).

[153] Gray & Hammond, *supra* note 152, at 6 (areas in which lay opinion testimony is deemed proper).

[154] *See, e.g.*, Hagan Storm Fence Co. v. Edwards, 245 Miss. 487, 492, 148 So. 2d 693, 695 (1963)(no necessity for admission where opinion offered is common knowledge); Illinois Central R.R. v. Williams, 242 Miss. 586, 607, 135 So. 2d 831, 839 (1961)(error to admit opinion evidence which could be of no help to jury); Messina v. New York Life Ins. Co., 173 Miss. 378, 390, 161 So. 462, 464 (1935)(where precise age of person is in issue, admission of lay opinion would not assist jury).

[155] For a good, brief introduction to the nature and uses of hypnotism see Quarles, *Hypnosis and the Law of Evidence: Testimony from the Hypnotically-Refreshed Mem-*

before the turn of this century, when the California Supreme Court disposed of a party's defense by unceremoniously informing him that "the law of the United States does not recognize hypnotism."[156] For more than fifty years, the few others who sought to use hypnotic testimony fared no better.[157] The first breach in the anti-hypnotic wall was made in 1959, when California held that a defendant could be hypnotized in the presence of his counsel if necessary to prepare an effective defense.[158] Nonetheless, a general judicial hostility to hypnotism persisted, due largely to a widespread impression that the scientific reliability of hypnotism had never been fully demonstrated[159] according to the accepted principles of evidentiary law.[160]

In *House*, the Mississippi Supreme Court indicated that its own reservations about the reliability of hypnotism were still strong. It therefore held that there was no basis for considering Tramontana an expert, from which it followed that the trial court had erred in admitting his opinion.[161]

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ory, 51 MISS. L.J. 743, 747-51 (1981).

[156] People v. Ebanks, 117 Cal. 652, 49 P. 1049, 1053 (1897). The language quoted was taken directly from the trial court's ruling on the objection to the hypnotic testimony. The supreme court would "only add the court was right." *Id.*

[157] *See, e.g*, State v. Pusch, 77 N.D. 860, 46 N.W.2d 508, 522 (1950)(statements made in hypnotic trance barred); *cf.* State v. Exum, 138 N.C. 599, 50 S.E. 283, 285-86 (1905)(hypnotic experience admissible only insofar as it went to witness's credibility).

[158] Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447, 449 (1959). The court did not state whether evidence thus obtained would be admissible. Rather, the court noted that hypnosis might aid in the discovery of admissible evidence. *Id.*

[159] *See, e.g.*, Rodriguez v. State, 327 So. 2d 903, 904 (Fla. Dist. Ct. App. 1976)(court "unconvinced of reliability"); Jones v. State, 542 P.2d 1316, 1327 (Okla. Crim. App. 1975)(doubting reliability and accuracy of hypnosis in establishing truth); Emmett v. State, 232 Ga. 110, 205 S.E. 2d 231, 235 (1974)(reliability of hypnosis not established); Greenfield v. Commonwealth, 214 Va. 710, 204 S.E. 2d 414, 419 (1974)(admitting that most experts consider hypnotic evidence unreliable).

[160] C. MCCORMICK, *supra* note 150, § 13. The evidentiary principle has been summarized thus: "[O]pinion evidence is [not] admissible if the court believes that the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert." *Id.*

[161] *House*, 445 So. 2d at 822. "Whatever value hypnosis may have as an investigative aid," the court opined, "it is our view at this time that it does not have the status as a science whose practitioners are capable of giving opinions regarding the truthfulness of their subjects with that high degree of validity that we demand of expert witnesses generally." *Id.*

3. Admissibility Of Testimony From A Hypnotically-Refreshed Memory

Although the lower court's decision in *House* was already destined to be reversed because of the improper admission of Tramontana's testimony, the court felt that the need for guidance on remand justified it in addressing the issue of whether a court could properly admit testimony from a hypnotically refreshed memory.[162] The defendant argued that the mere fact that M.P. had undergone hypnosis should have barred her from testifying at all. The Mississippi Supreme Court followed the weight of authority in rejecting this position[163] and holding that objections to such testimony go to its weight and credibility rather than to its admissibility.[164] The court warned, however, that extreme caution should be used in admitting such evidence, since the hypnotically-refreshed memory of a witness can be "contaminated."[165] If such testimony is to be allowed, certain procedural safeguards must be observed.[166] In determining what the safeguards should be, the court referred to other proposed guidelines[167] and found little substantive difference among them.[168] Accordingly, it fashioned a checklist for use by trial judges, who were to conduct a hearing out of the jury's presence to determine whether the proposed testimony was procedurally sanitary.[169] The opinion stressed that compliance with these steps is

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[162] *Id.* at 823.

[163] *See, e.g.*, United States v. Awkard, 597 F.2d 667, 669 (9th Cir.)(no difficulty in admitting hypnotically-refreshed testimony), *cert. denied*, 444 U.S. 885 (1979); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969)(hypnotic experience does not disqualify witness); State v. Hurd, 86 N.J. 525, 432 A.2d 86, 94 (1981)(hypnotically-refreshed testimony not necessarily untrustworthy). *But see* United States v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984)(post-hypnotic testimony inadmissible to identify defendant).

[164] *See House*, 445 So. 2d at 824.

[165] *Id.* at 824-25. For an explanation of the "contamination" problem, see Quarles, *supra* note 155, at 751 (hypnotically-refreshed witness can "confabulate" to fill gaps in testimony); Diamond, *Inherent Problems in the Use of Pretrial Hypnosis of a Prospective Witness*, 68 CALIF. L. REV. 313, 314-15 (1980)(hypnotized person often "suggestible" long after trance); Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 VA. L. REV. 1203, 1211-12 (1981)(witnesses sometimes "recall future events").

[166] *House*, 445 So. 2d at 826.

[167] *Id. See, e.g.*, Quarles, *supra* note 155, at 765 (five general guidelines suggested for judicial use); State v. Hurd, 86 N.J. 525, 432 A.2d 86, 89-90 (1981)(six procedural steps suggested by expert witness at trial).

[168] *House*, 445 So. 2d at 826.

[169] *Id.* at 826-27. These procedural steps are as follows:

> (1) The hypnotic session . . . must have been administered by a licensed psychiatrist or psychologist trained in the use of hynosis.
>
> (2) Any information given to the hypnotist by law enforcement personnel,

mandatory.[170] Having delineated the errors of the lower court and taken steps to guard the integrity of future proceedings, the court remanded the instant case for proceedings consistent with its opinion.[171]

The court's approach in *House* represents a balanced and prudent treatment of the use of hypnotically-procured testimony. To reject such evidence out of hand might deprive the law of a valuable investigative tool. On the other hand, a *laissez-faire* policy might have meant that the winds of doctrinal controversy sometimes buffeting a young discipline would have been released upon unsuspecting juries. The procedural safeguards announced in *House* are not onerous, and they may provide an opportunity to test the value of hypnotic testimony under careful supervision from the bench. Such a period of testing will probably be necessary if we are to reach the stage at which definitive acceptance or rejection of hypnotism as a science will be possible.

B. Scope of Surprise Exception To Voucher Rule

Recently the Mississippi Supreme Court confronted one of the thornier problems of the law of evidence: To what extent is a party in a criminal case bound by the utterances of his own witness? This matter came before the court in *Moffett v. State*,[172] a capital murder case.

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by the defendant or from any other source prior to the hypnotic session should be in written form and should be preserved . . . .

(3) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them . . . . The witness' pre-hypnotic memory should be preserved via tape recording, or, if possible, video tape.

(4) The entire procedure of hypnosis and the hypnotic interview should be tape recorded, or, if possible, video taped.

(5) Only the hypnotist and the subject should be present during any phase of the hypnotic session . . . .

(6) The opposing party . . . should have full access, prior to trial, to the recording of the hypnotic interview . . . .

(7) All opposing parties must be given free rein to cross-examine the hypnotically-induced witness and/or the hypnotist . . . .

(8) No hypnotically-enhanced statements made by a witness or victim may be received into evidence unless there is available otherwise admissible corroborating testimony or physical evidence which tends to substantiate the hypnotically-enhanced statements.

Id.

[170] *Id.* at 827.

[171] *Id.* at 828.

[172] 456 So. 2d 714 (Miss. 1984). James Vincent Moffett was indicted for the murder of a gas station attendant in Gulfport. He was tried by jury in the Circuit Court of Harrison County, found guilty of capital murder, and sentenced to death. *Id.* At trial, the

At common law, a party was forbidden to impeach his own witness.[173] This rule was based on the idea that a party who called a witness had "vouched" for the truthfulness of his testimony and should not be heard to complain of it afterwards.[174] It was also said that permitting impeachment would "coerce the witness to testify as desired" out of fear that his character would be attacked if he did not.[175] The voucher rule has been sharply criticized by courts[176] and commentators.[177] The federal system has abandoned it entirely.[178]

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state relied almost exclusively on a statement by Garland Mose Johnson, Moffett's half-brother. At the time of Moffett's arrest, Johnson was in police custody for an unrelated offense. In the presence of police detectives, he made a videotaped statement claiming that he and Moffett had been driving around together on the night of the shooting. Johnson stated that he and Moffett drove to an area very near the scene of the shooting and Moffett left the car. Johnson said that he then heard gunfire, and that when Moffett returned to the car he was unusually eager to leave the area. *Id.* at 716. Almost four months after the making of this videotaped statement, Moffett's attorneys interviewed Johnson. At this meeting Johnson repudiated his earlier statement, and told them that he and Moffett had not been near the site of the crime that night. *Id.* At a subsequent interview shortly before trial, Johnson stood by his second story, adding that the videotaped statement had been the product of his fear that he himself would be charged with the murder. *Id.* at 717. Moffett's attorneys said nothing about this until the morning of the trial, when they approached the district attorney and told him that Johnson had recanted the statement implicating Moffett. Anticipating a plea of surprise by the state, the defense attorneys made a motion *in limine* to bar any such plea. The trial judge ruled that such a motion was premature until Johnson actually testified. Some 30 hours after the beginning of the trial, the state called Johnson as a witness. He promptly repudiated the videotaped statement and gave testimony that substantially conformed to the story he had given Moffett's attorney. *Id.*

At this juncture the state, pleading surprise, asked for leave to cross-examine and impeach Johnson. Defense counsel argued that the state had not been truly surprised, since it had actual knowledge of Johnson's recantation before trial. After a hearing *in camera*, the trial judge allowed the impeachment. *Id.* The state then began a vigorous cross-examination of Johnson, in which he was confronted with the videotaped statement. *Id.* at 718. Moreover, the judge ultimately permitted a transcript of the videotape to be admitted into evidence, and it was subsequently relied on by the prosecution as substantive evidence, and not solely for impeachment purposes. *Id.* at 720.

[173] C. McCormick, *supra* note 150, § 38.

[174] *Id.*

[175] *Id.*

[176] *See, e.g.*, United States v. Norman, 518 F.2d 1176, 1177 (9th Cir. 1975)(per curiam)(rule rejected as "archaic, irrational and potentially destructive of truth-gathering process"); United States v. Bryant, 461 F.2d 912, 918 (6th Cir. 1972)(justifications for rule rejected as "unsound and illogical"); State v. Ross, 80 N.J. 239, 403 A.2d 457, 463 (1979)(voucher rule impinges on process of ascertaining truth).

[177] *See, e.g.*, C. McCormick, *supra* note 150 § 38 (no valid reasons support adherence to voucher rule); Ladd, *Impeachment of One's Own Witness: New Developments*, 4 U. Chi. L. Rev. 69, 69-70 (1936)(rule holdover from ancient trial by compurgation).

Mississippi long followed the common-law rule.[179] In civil cases, the rule has been jettisoned,[180] but it has been retained in criminal law, albeit in an eroded condition.[181] The state courts have carved out one major exception to the voucher rule: a party may impeach his own witness when that witness has surprised him by hostile testimony.[182] Whether hostility and surprise exist is a question of law to be determined by the court.[183] Mississippi's courts have been strict in their assessments of this question, requiring more than a mere showing that the testimony was not as gratifying as the party had expected. In *Rutland v. State*,[184] which involved a sudden change of the witness's story in a manslaughter case, the court went so far as to say that the party calling the witness must have been "entrapped into introducing a hostile witness."[185] In *Hall v. State*,[186] considered by the present court to

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[178] FED. R. EVID. 607 simply states the following: "The credibility of a witness may be impeached by any party, including the party calling him." *Id.*

[179] *See, e.g.*,, Manning v. State, 188 Miss. 393, 398, 195 So. 319, 320 (1940)(party may not attack credibility of his own witness); Bore v. State, 185 Miss. 547, 554, 188 So. 557, 558 (1939)(party may not impeach his own witness absent showing of surprise and hostility); Moore v. Chicago, St. Louis & New Orleans R.R., 59 Miss. 243, 248 (1881)(party may not impeach his own witness by introducing prior inconsistent statements); *see also* Bynum v. State, 242 Miss. 862, 864, 137 So. 2d 515, 517 (1962)(error for court to hold neither party responsible for calling witness and to allow both parties to impeach witness's testimony).

[180] MISS. R. CIV. P. 43(b)(4)(adopted in 1982; restates FED. R. EVID. 607); *see supra* note 178.

[181] *Moffett*, 456 So. 2d at 718. In *Moffett* the court stated that the voucher rule "has become riddled with exceptions." *Id.; see* Chambers v. Mississippi, 410 U.S. 284, 294-98 (1973)(Mississippi party-witness rule violated confrontation clause of sixth amendment). In *Chambers*, the United States Supreme Court held that because defendant Chambers was denied the opportunity to cross-examine his witness concerning the witness's repudiation of previous statements, he was denied the substantive right of impeaching the credibility of an unexpectedly hostile witness. *Id.* at 295. The United States Supreme Court concluded that the substantive right of a party to challenge a statement made by a witness in a criminal proceeding should not be limited by the technicality of which party called the witness or whether the witness's testimony was "adverse to" or "against" that party. *Id.* at 297-98; *see also* Clark v. Lansford, 191 So. 2d 123, 125-26 (Miss. 1966)(party not bound by utterances of witness whose testimony was compulsory). In *Clark*, the Mississippi Supreme Court explained that the policy reasons supporting the voucher rule did not apply to those witnesses which a party was required to call. *Id.* at 125.

[182] *See, e.g.*, Hall v. State, 250 Miss. 253, 264, 165 So. 2d 345, 350 (1964)(party may impeach own witness only after laying proper foundation that witness is unexpectedly hostile); Bacot v. Hazlehurst Lumber Co., 23 So. 481, 483 (Miss. 1898)(party may impeach his witness when surprise and hostility are shown).

[183] Gunn, *Witnesses*, 48 MISS. L.J. 1059, 1073 (1977).

[184] 170 Miss. 670, 155 So. 681 (1934).

[185] *Rutland*, 170 Miss. at 653-54, 155 So. at 681-82 (quoting Dunlap v. Richardson,

be a leading case,[187] it was held that "[t]he party must first show that the evidence as given has taken him by surprise, and that the witness is hostile."[188] This standard has been adhered to in numerous subsequent decisions.[189]

In the instant case, the Mississippi Supreme Court held that there could be no genuine surprise when the party calling the witness had actual notice of the change in the witness's testimony.[190] The court noted that it was "hornbook law" that a prior inconsistent statement can be admitted only for impeachment purposes and not as substantive evidence,[191] also adding a lengthy discussion of Mississippi cases illustrating the point.[192]

In a strongly worded dissent, parts of which suggest the development of acrimony among the court's members,[193] Justice Bowling argued that since jeopardy had attached to defendant Moffett at the

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63 Miss. 447, 449 (1886)). In *Dunlap*, the court had stated that the exception to the voucher rule applied only when the party had been "deceived or misled by fraud or artifice practiced upon him by the witness." *Dunlap*, 63 Miss. at 449. The court also ruled that the witness must be given an opportunity to explain his testimony. *Id.*

[187] 250 Miss. 253, 165 So. 2d 345 (1964).

[188] *See Moffett*, 456 So. 2d at 718 (describing necessary foundation required for impeachment (quoting *Hall*, 250 Miss. 253, 165 So. 2d 345 (1964)).

[189] *Hall*, 250 Miss. at 264, 165 So. 2d at 350. *Hall* involved a prosecution for attempted criminal abortion in which the pregnant woman contradicted her earlier statement by asserting that she had not hired the defendant to perform her abortion. Impeachment was held proper in this instance, but the conviction was reversed on other grounds. *Id.* at 253, 165 So. 2d at 349-50.

[190] *See, e.g.*, Allison v. State, 447 So. 2d 649, 650 (Miss. 1984)(party may impeach own witness after showing surprise and hostility); Young v. State, 425 So. 2d 1022, 1028 (Miss. 1983)(credibility of hostile witness may be attacked by evidence of prior inconsistent statements if party has been surprised by testimony at trial); Gardner v. State, 368 So. 2d 245, 248 (Miss. 1979)(after laying proper foundation, party may cross-examine unexpectedly hostile witness); Hooks v. State, 197 So. 2d 238, 239-40 (Miss. 1967)(showing of surprise and hostility necessary prerequisites for party to impeach own witness).

[191] *Moffett*, 456 So. 2d at 719. Writing for the majority, Justice Robertson observed that Johnson did not actually testify until some 30 hours after the state had been advised of the recantation. *Id.* The court did not say how much sooner a witness must testify in order for genuine surprise to exist. *Id.*

[192] *Id.; see also* C. McCormick, *supra* note 150, § 251 (prior inconsistent statement admissible as substantive evidence only if it falls "within one of the exceptions to the hearsay rule").

[193] *Moffett*, 456 So. 2d at 718-20.

[194] *Id.* at 724-728 (Bowling, J., dissenting). In his preliminary remarks, Justice Bowling complained that "[i]t is hard for one judge to have guts enough to write a dissent in opposition to the others . . . . Such a judge, when that dissent is distributed among the judges, is subjected to abuse and scurrilous attacks on his ability and intentions." *Id.* at 724 (Bowling, J., dissenting).

time witness Johnson testified, denying the state an opportunity to impeach would in effect cripple its prosecution.[194] He reasoned that the "iron-clad rule" of the majority unduly curtailed the broad discretion Mississippi trial judges have enjoyed in deciding questions of surprise.[195] Moreover, he believed that the tactics employed by defense attorneys in this case were so underhanded as to meet the "fraud and artifice" test of *Rutland*.[196]

The result in *Moffett* graphically illustrates the voucher rule's potential for causing mischief. A mechanistic application of the surprise exception prevents courts from asking whether the treachery of the witness, as a practical matter, impairs the ability of the party calling him to present his case. As the law now stands, the court need only ask whether the party knew, however briefly, of the change in testimony before the opening gavel fell. It is difficult not to share Justice Bowling's concern that such a rule places a premium on the use of manipulative ruses by parties who fortuitously learn of the change before their adversaries.[197] The majority opinion noted that various suits now pending ask the court to abolish the voucher rule.[198] It is to be hoped that when these cases are adjudicated, Mississippi will adopt the liberal policy of the federal rules, or, failing that, effect a major overhaul of the current exceptions.*

Jim Neeld
Cecil Ross
William Young

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[194] *Id.* at 727-28 (Bowling, J., dissenting).

[195] *Id.* at 726 (Bowling, J., dissenting).

[196] *Id.* at 726-27 (Bowling, J., dissenting). Justice Bowling also believed that the error of admitting Johnson's prior statement as substantive evidence was cured by the trial court's jury instructions. *Id.* at 728 (Bowling, J., dissenting). The majority opinion noted that the trial judge's instruction on the use of prior inconsistent statements had correctly stated the law on the matter, but thought it unrealistic to say that this had cured the error. *Id.* at 720. Justices Roy Noble Lee and Hawkins also authored concurring opinions. *Id.* at 721 and 724 (Roy Noble Lee, J., specially concurring and Hawkins, J., specially concurring).

[197] *Id.* at 726-727 (Bowling, J., dissenting). Justice Roy Noble Lee argued that the defense attorney in the instant case "did all he could" to inform his adversary. *Id.* at 722 (Roy Noble Lee, J., specially concurring). However, that statement is clearly erroneous in view of the fact, plainly recounted in the majority opinion, that Moffett's lawyers learned about Johnson's intent to recant on June 30, but said nothing about it until the day of the trial two weeks later. *Id.* at 716-17.

[198] *Id.* at 718.

* Editor's note: By order dated September 24, 1985, the Supreme Court of Mississippi adopted the Mississippi Rules of Evidence, which shall govern "all proceedings in any action had on or after January 1, 1986," in the courts of Mississippi. Duplicating Rule 607 of the Federal Rules of Evidence, Mississippi now provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." MISS. R. EVID. 607. This is a repudiation of the voucher rule which had already been eliminated in regard to civil cases. Rule 607 extends its repudiation of the voucher rule to criminal cases as well.

MISCELLANEOUS

In 1984, the Mississippi Supreme Court decided a number of cases in the areas of divorce,[1] child custody and support,[2] other domestic

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[1] Schilling v. Schilling, 452 So. 2d 834, 835-36 (Miss. 1984)(award of $240,000 lump sum alimony plus $1000 monthly periodic payment alimony, $900 monthly child support, and attorney's fees held not excessive); Bush v. Bush, 451 So. 2d 779, 781-82 (Miss. 1984)(error to require wife to choose between lump sum and periodic payment alimony; bond required where husband had history of arrearage in child support payments and no intention to remain in state; husband and wife jointly liable for wife's medical bills accrued at time of trial); Stringfellow v. Stringfellow, 451 So. 2d 219, 221-22 (Miss. 1984)(proper to refuse to modify alimony award under Miss. R. Civ. P. 60(b)(2) based upon attorney's failure to discover true value of husband's estate); Brown v. Brown, 450 So. 2d 1083, 1084 (Miss. 1984)(appeal of decree denying divorce dismissed when marriage dissolved by foreign decree while appeal pending); McConnell v. McConnell, 449 So. 2d 785, 786-87 (Miss. 1984)(denial of partition sale of commercial property to divorced co-tenant improper, and husband entitled to partition by right); Blue v. Blue, 445 So. 2d 1383, 1384 (Miss. 1984)(parties may convert tenancy in the entirety to tenancy in common by incorporating settlement agreement into divorce decree); Boykin v. Boykin, 445 So. 2d 538, 539 (Miss. 1984)(award of possession of marital residence to wife, until she married or moved, proper even though husband granted custody to sole remaining minor child).

[2] Jonence v. Moore, 455 So. 2d 778, 780 (Miss. 1984)(affirming award of permanent custody to father; "tender years" doctrine inapplicable to son age seven years); Sistrunk v. McKenzie, 455 So. 2d 768, 770 (Miss. 1984)(unnecessary to consider material changes in circumstances where child custody is merely modified and permanent custody remained unchanged); Baneck v. Baneck, 455 So. 2d 766, 767-68 (Miss. 1984)(reversible error to award child custody to mother based solely on grounds she was not found morally unfit); Grimsley v. Tyner, 454 So. 2d 482, 484 (Miss. 1984)(upholding chancellor's refusal to grant judgment notwithstanding jury verdict denying paternity where expert evidence showed 99.6% chance of paternity; case reversed and remanded on other grounds); Tucker v. Tucker, 453 So. 2d 1294, 1297-98 (Miss. 1984)(affirming refusal to modify child custody based on no finding of material change in circumstances); Bonds v. Bonds, 453 So. 2d 1020, 1022 (Miss. 1984)(sheriff liable for failure to return by specified date an unserved writ of garnishment for child support); Davis v. Washington, 453 So. 2d 712, 714 (Miss. 1984)(reversible error where expert who conducted blood test to determine paternity did not testify pursuant to Miss. Code Ann. § 93-9-23; youth court had no jurisdiction to determine paternity); Denney v. Denney, 453 So. 2d 693, 694 (Miss. 1984)(rejecting psychologist's testimony as to detrimental change in circumstances); Edwards v. James, 453 So. 2d 684, 686 (Miss. 1984)(party seeking modification of child support must give opposing party five days notice pursuant to Miss. R. Civ. P. 6(d)); Boleware v. Boleware, 450 So. 2d 92, 93 (Miss. 1984)(proper to modify divorce decree to reimburse mother for son's college tuition despite son being over 21 years of age); Ivy v. State Dep't of Pub. Welfare, 449 So. 2d 779, 782 (Miss. 1984)(affirming preponderance of evidence standard for proof of paternity during lifetime of putative father); McCollum v. State Dep't of Pub. Welfare, 447 So. 2d 650, 653 (Miss. 1984)(chancellor must sustain

relations,[3] wills and estates,[4] and insurance.[5] Selected cases from these

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either motion to transfer paternity action venue to father's county of residence or motion that mother be made a party to cross-bill for custody); Marascalco v. Marascalco, 445 So. 2d 1380, 1383 (Miss. 1984)(affirming child custody decree but remanding for updated hearing as to child's best interest); Donaldson v. Pontotoc County Welfare Dep't, 445 So. 2d 1377, 1379 (Miss. 1984)(affirming decree pro confesso of paternity and child support; relief under MISS. R. CIV. P. 60(b)(6) based upon illiteracy and ignorance properly denied).

[3] Langham v. Herrington, 449 So. 2d 228, 229 (Miss. 1984)(upholding injunction preventing widow's removal of husband's body from cemetery originally chosen by widow and sister and children of deceased); In the Interest of T.D.B., a Minor Child, 446 So. 2d 598, 600 (Miss. 1984)(confinement of minor adjudicated delinquent not mandatory; arson statute requiring mandatory confinement superseded by statute granting broad power to youth court); *In re* Estate of Alexander, 445 So. 2d 836, 839-40 (Miss. 1984)(error to impose equitable life estate to decedent's homestead property in favor of survivor of couple who cohabitated for 33 years); Petit v. Holifield, 443 So. 2d 874, 878-79 (Miss. 1984)(father not proven by clear and convincing evidence to be unfit or to have abandoned or deserted children).

[4] Berry v. Berry, 463 So. 2d 1031, 1032-33 (Miss. 1984)(illegitimates may bring claims existing prior to July 1, 1981 against ancestors' estates within three years of July 1, 1981, pursuant to MISS. CODE ANN. § 91-1-15 (Supp. 1984)); In the Matter of Chambers, 458 So. 2d 691, 693 (Miss. 1984)(failure to make annual accountings as required by MISS. CODE ANN. § 91-7-277 (1972) was breach of executor's mandatory duties); Medders v. Ryle, 458 So. 2d 685, 689 (Miss. 1984)(signature of spouse on land mortgage, without more, does not give rise to resulting trust in favor of spouse); Estate of Lawler v. Weston, 451 So. 2d 739, 743 (Miss. 1984)(affirming general verdict setting will aside where dual issues of undue influence and lack of testamentary capacity submitted to jury); Warren v. Foster, 450 So. 2d 786, 788 (Miss. 1984)(child adopted in Tennessee may inherit from deceased natural parent who resided in Mississippi; Mississippi law controls); In the Matter of Kimble, 447 So. 2d 1278, 1283 (Miss. 1984)(illegitimates may bring claims existing prior to July 1, 1981 against ancestors' estates within three years of July 1, 1981, pursuant to MISS. CODE ANN. § 91-1-15 even though ancestors died before July 1, 1981); Shaw v. Ladner, 447 So. 2d 1272, 1274-75 (Miss. 1984)(affirming quantum meruit award for services performed during lifetime of decedents based on oral contract); Peterman v. Peterman, 447 So. 2d 126, 129 (Miss. 1984)(reversible error to find no confidential relationship existed between testatrix and son based on evidence of record); Harris v. Sellers, 446 So. 2d 1012, 1014 (Miss. 1984)(reversible error not to raise presumption of undue influence where proof showed beneficiary of will had confidential relationship with testatrix); Stevenson v. Daniels, 446 So. 2d 597, 597-98 (Miss. 1984)(illegitimate child not barred by six-year statute of limitations from asserting claim to estate as heir-at-law even though six years had passed from date child reached majority); Murray v. Laird, 446 So. 2d 575, 578-80 (Miss. 1984)(presumption of undue influence arising from confidential relationship not rebutted where no showing of independent advice to grantor before inter vivos transfer); Mississippi Bank v. Kelly, 445 So. 2d 849, 851 (Miss. 1984)(bank could not constitutionally be charged with contempt of court order allowing no disbursement of estate funds where it was not made party to order); *In re* Estate of Alexander, 445 So. 2d 836, 837-40 (Miss. 1984)(cohabitation alone does not give rise to equitable life estate in decedent's homestead).

[5] Thomas v. Deviney Constr. Co., 458 So. 2d 694, 698 (Miss. 1984)(jury question as

areas are treated textually.

I. Domestic Relations

A. Limited Review of Child Custody Decree

In 1984, the Mississippi Supreme Court clarified the extent to which it will review a chancellor's child custody decree. In *Marascalco v. Marascalco,*[6] the plaintiff filed suit against his former wife to modify the child custody provisions of their divorce decree which had granted custody of the two minor children to the former wife. The husband alleged a material change in circumstances.[7] The chancellor denied the petition but found enough change in circumstances to request that the Madison County Welfare Department make periodic, unannounced inspections.[8]

A unanimous supreme court reluctantly affirmed the chancellor's ruling which was grounded in well-established law governing changes

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to employer's liability when foreman authorized employee's personal use of truck in violation of company policy; employer has legal obligation to file as self-insured under safety responsibility laws); Indiana Lumbermans Mut. Ins. Co. v. Curtis Mathes Mfg. Co., 456 So. 2d 750, 755 (Miss. 1984)(insurer is barred by statute of limitations applicable to insured despite subrogation during limitation period); Old Security Casualty Ins. Co. v. Clemmer, 455 So. 2d 781, 783 (Miss. 1984)(extent of insurer's liability for punitive damages limited to policy provisions brought into play as result of contractual agreement expressed in insurance policy); Estate of Murrell v. Quin, 454 So. 2d 437, 439 (Miss. 1984)(life tenant and remainderman have insurable interest in realty and personalty; insurance proceeds do not run with the land); Aetna Casualty & Sur. Co. v. Barker, 451 So. 2d 731, 735-36 (Miss. 1984)(driver's uninsured motorist coverage on another vehicle unavailable to plaintiff injured while passenger in vehicle not listed on driver's policy); Weems v. American Sec. Ins. Co., 450 So. 2d 431, 436-37 (Miss. 1984)(worsening financial condition, conviction of forgery where insurer knew of indictment at the time policy was issued, and vacancy of premises when insurer had knowledge thereof within 24 hours did not constitute moral hazard sufficient to suspend insurance coverage prior to loss); Ford v. Lamar Life Ins. Co., 449 So. 2d 1204, 1206-07 (Miss. 1984)(existence of conditional receipt for life insurance contract creates factual issue of whether decedent was standard risk when death occurred after medical exam but before issuance of policy); Government Employees Ins. Co. v. Brown, 446 So. 2d 1002, 1006 (Miss. 1984)(stacking allowed where multiple premiums paid on uninsured motorist provisions of single policy or where limitation clause ambiguous); Vaughn v. State Farm Mut. Auto. Ins. Co., 445 So. 2d 224, 227 (Miss. 1984)(statute of limitations for claim of uninsured motorist coverage did not begin to run until driver was adjudicated as uninsured).

[6] 445 So. 2d 1380 (Miss. 1984).

[7] *Id.* at 1381.

[8] *Id.* The chancellor found that although the children's mother had a history of alcohol abuse, the problem was not serious enough to warrant a change in primary custody. *Id.* The divorce decree, however, was altered to allow the children to spend most of their summer vacations with their father. *Id.* at n.1.

in child custody[9] and was within the chancellor's broad discretion.[10] Justice Robertson noted, however, that the supreme court also sits as "chancellors"[11] in such cases. The court exercised this power and remanded the case to the chancellor for an updated consideration of the best interest of the children.[12]

The supreme court had assumed the status of chancellor in previous cases similar to *Marascalco.* In *Eggleston v. Landrum*[13] and *Case v. Stolpe,*[14] the court modified the lower court's decree in the best interest of the child.[15] Acting in the same capacity in *Marascalco,* how-

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[9] *Id.* at 1382. Child custody may not be changed absent a material change in circumstances. *See, e.g.,* Kavanaugh v. Carraway, 435 So. 2d 697, 698-700 (Miss. 1983)(no material change in circumstances for mother to live with new husband for one month prior to remarriage); Cheek v. Ricker, 431 So. 2d 1139, 1144 (Miss. 1983)(mother's indiscretion with another man not material change in circumstances); O'Neal v. Warden, 345 So. 2d 610, 611 (Miss. 1977)(fact that mother had "repented" of prior unstable conduct not material change in circumstances warranting removal of children from father).

[10] *Marascalco,* 445 So. 2d at 1382. A chancellor's findings of fact must be affirmed if supported by substantial, credible evidence. *See, e.g.,* Culbreath v. Johnson, 427 So. 2d 705, 707-08 (Miss. 1983)(affirming chancellor's conclusion that signature on deed was forgery). It is assumed that the chancellor resolved in favor of the appellee issues to which there is no specific finding of fact. *See, e.g.,* Harris v. Bailey Ave. Park, 202 Miss. 776, 791, 32 So. 2d 689, 694 (Miss. 1947)(intepreting chancellor's silence on fact issue as finding in favor of appellee, despite disputed testimony).

[11] *Marascalco,* 445 So. 2d at 1381.

[12] *Id.* The controlling principle in child custody cases is the best interest and welfare of the child. Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983). Sitting as an appellate court, the supreme court was limited to a review of the record and thereby not allowed to consider any change in circumstances occurring in the 33-month interval between the hearing and the appeal. Consequently, it affirmed the lower court's decision. The supreme court's power as chancellor, however, permitted it to remand for a current assessment of the matter. *Marascalco,* 445 So. 2d at 1381.

[13] 210 Miss. 645, 50 So. 2d 364 (1951).

[14] 300 So. 2d 802 (Miss. 1974).

[15] In *Eggleston,* the supreme court reversed the chancellor's denial of adoption. The lower court had denied the petition solely on the ground that petitioners were Christian Scientists. On appeal, the Mississippi Supreme Court found that petitioners had provided all necessary medical and surgical care to the child for the two years he was in their care and that they would continue to do so. The court noted that the right to adopt was unknown at common law and exists only by virtue of statute, under which the paramount question is the best interest of the child. *Eggleston,* 210 Miss. at 649-54, 50 So. 2d at 365-67. *See generally* Note, *Adoption—Allowed Where Petitioners were Believers in the Christian Science Religion,* 23 MISS. L.J. 145, 145-46 (1952)(discussing *Eggleston*); Note, *Domestic Relations—Adoption,* 23 MISS. L.J. 269, 269 (1952)(same).

In *Case,* the supreme court modified the chancellor's child custody decree on the basis that it was not in the best interest of a nine year old child to be shifted from parent to parent, citing the general rule that a child of "tender years" should be with her mother, unless she is an unfit custodial parent. *Case,* 300 So. 2d at 804. *But cf.* Torrence

ever, the court remanded the case to the chancellor to allow him the opportunity to modify his own decree.[16] The court in *Cheek v. Ricker,*[17] however, rejected the contention that the supreme court possessed wisdom greater than that of the chancellor to pass on the ultimate issue.[18]

The holdings in *Marascalco* and *Cheek* represent a contraction in the chancery power exercised on appeal by the supreme court.[19] *Cheek* refined the scope of review the supreme court may use when it sits as chancellor.[20] When a chancellor's child custody decree is supported by substantial, credible evidence, the court will affirm the decree as handed down by the lower court.[21] *Marascalco* represents the next logical step. Any considerations the court has about the continuing best interest of the child while sitting as chancellor may be addressed on remand.[22]

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v. Moore, 455 So. 2d 778, 778-80 (Miss. 1974)(upholding chancellor's decision to permit father to have custody of seven-year-old son despite finding mother was fit and suitable).

[16] *Marascalco,* 445 So. 2d at 1381.

[17] 431 So. 2d 1139 (Miss. 1983).

[18] *Id.* at 1141. Justice Robertson, who also wrote the *Cheek* opinion, stated:

> The chancellor listened carefully and patiently to all of the evidence in an unnecessarily adversary proceeding and in the end declined to alter the substance of the original custody order. Intimating that we possess more of the wisdom of Solomon than the chancellor, Hollis C. Cheek appeals to this Court. For the reasons stated below, we affirm.

Id.

[19] *See id.* at 1143:

> [F]indings of fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly wrong. [Citations omitted.] This is so whether the finding relates to an evidentiary fact, e.g., did Pamela sleep with a man to whom she was not married, or ultimate fact, e.g., was Pamela a fit and suitable person to have the care and custody of her child. [Citation omitted.]

Id. But cf. Case, 300 So. 2d at 805 (modifying chancellor's custody decree because of minor change in parties' condition); Cassell v. Cassell, 211 Miss. 841, 846, 52 So. 2d 918, 920-21 (1951)(reversing chancellor's modification of custody decree because of insufficient change in circumstances); *Eggleston,* 210 Miss. at 654, 50 So. 2d at 367 (reversing chancellor's denial of petition for adoption based upon religious beliefs of adoptive parents).

[20] *Cheek,* 431 So. 2d at 1143 n.1. Justice Robertson wrote in *Cheek*:

> That on review we may sit as "chancellors," as some have suggested [*Eggleston, Case*] means only that we have a conscience both collectively and individually, and that we too must bring to our consideration of cases such as this the same qualities of wisdom, patience, tolerance and humanity. *It does not mean that the rules regulating the scope of review, rules long embedded in the positive law of this state, have been relaxed.* [Emphasis added.]

Id.

[21] *See id.* at 1143, 1145.

[22] *See supra* note 12 and accompanying text.

The decision in *Marascalco* appears to expand the remedies of a party whose child custody petition is denied. Even if the supreme court affirms the chancellor's decision, a party can argue for a remand in hopes that a change in circumstances during the appeal will allow that party to prevail on the custody issue.[23] It is unlikely, however, that this will often occur.[24]

B. Venue Requirements in Paternity and Child Support Proceedings

McCollum v. State Department of Public Welfare[25] resulted in reversal of a decree establishing paternity and ordering child support payments. The Mississippi Supreme Court concluded that the chancellor erred in refusing to sustain either a motion for change of venue or a motion to make the natural mother a party and hear a cross-bill against her for custody.[26]

The Department of Public Welfare brought an action against Walter McCollum pursuant to sections 43-19-31 and 93-9-9 of the Mississippi Code.[27] Section 43-19-31 authorizes the department to bring paternity and support proceedings against the father of a child who is receiving aid from the department. Venue is proper in the county where either the father, the mother, or the child is found.[28] Section 93-9-9 allows "any public authority chargeable by law with the support of the child" to petition to establish paternity.[29] Venue is proper in the county where the father resides.[30] The suit in *McCollum* was filed by

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[23] *See Marascalco*, 445 So. 2d at 1382-83. The court set no guidelines for determining the period for which a change in circumstances would permit it to sit as chancellors and remanded the case.

[24] *See supra* note 12 and accompanying text.

[25] 447 So. 2d 650 (Miss. 1984).

[26] *Id.* at 651, 654. The defendant had admitted paternity in his answer. The Hinds County Chancery Court decree consequently ordered the defendant to pay $75 per month in child support to the Hinds County Welfare Department. *Id.* at 652.

[27] *Id.* at 652.

[28] MISS. CODE ANN. § 43-19-31(a)(Supp. 1983).

[29] MISS. CODE ANN. § 93-9-9 (Supp. 1983).

[30] MISS. CODE ANN. § 93-9-17 (1972) provides:

> An action under sections 93-9-1 to 93-9-49 may be brought in the county where the alleged father is present or has property; or in the county where the mother resides; or in the county where the child resides. However, if the father resides or is domiciled in this state, the action must be brought in the county where the father resides.

Id.

the department in Hinds County, the residence of the mother.[31] Walter McCollum, the father and a resident of Simpson County, made a motion for a change of venue and a motion requesting that the mother be made a party to his cross-bill for child custody. The chancellor denied both motions.[32]

On appeal, the Mississippi Supreme Court found that the chancellor erred in denying both motions. Previously, in *Metts v. State Department of Public Welfare*,[33] the court had held that when suit is brought under sections 49-19-31 and 93-9-9, venue is proper only in the county of the father's residence.[34] Thus, in *McCollum*, it would have been proper for the chancellor to overrule the motion for change of venue only if he had sustained the motion to hear the custody issue.[35] Accordingly, the supreme court reversed and remanded for a change of venue or a hearing on all issues.[36]

McCollum has expanded the possibilities for litigation when a father is sued by the Department of Public Welfare under sections 43-19-31 and 93-9-9. If the defendant is not sued in the county of his residence, he has the option of introducing a cross-bill on the issue of child custody, thereby inducing further litigation while preserving venue.[37] Alternatively, the defendant has the *Metts* option of moving for a transfer of venue.[38]

The *McCollum* decision is not, in and of itself, a particularly noteworthy milestone in the law. It illustrates, however, the problem faced by the state in attempting to recover funds expended for child support. More notably, in August, 1984, Congress passed a law requiring the

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[31] *McCollum*, 447 So. 2d at 652.

[32] *Id.* Although McCollum also made a motion for a continuance, the court found no merit to the assignment of error that the chancellor's overruling of that motion was improper. *Id.*

[33] 430 So. 2d 401 (Miss. 1983).

[34] *Id.* at 405. In *Metts*, the court held that when a paternity action is brought against the natural father pursuant to sections 43-19-31 and 93-9-9, venue is controlled by section 93-9-17. If the father is a resident of the state, he must be sued in the county of his residence. *Metts*, 430 So. 2d at 405; *see supra* note 30.

[35] *McCollum*, 447 So. 2d at 653. If the court had sustained the father's motion to make the mother a party to the cross-bill, the issue would have been one of child custody and the Hinds County Chancery Court would have had authority to hear the case under MISS. CODE ANN. § 93-11-65 (1972), which grants jurisdiction to hear child custody suits to chancery courts.

[36] *McCollum*, 447 So. 2d at 653. The court noted that if venue was transferred, the only remaining issue would be child support since paternity was admitted in McCollum's answer. *Id.*

[37] *See supra* note 35 and accompanying text.

[38] *See supra* notes 30, 34 and accompanying text.

states to pass uniform laws requiring withholding of child support payments from paychecks of fathers who fall behind on payments by more than thirty days.[39] The *McCollum* court recognized the kind of problem such legislation could present. The court noted that defendants in cases such as *McCollum* and *Metts* will often be indigents, assisted by tax-supported legal aid services litigating in a state-funded forum.[40] In *McCollum*, the Department of Public Welfare was interested only in relieving the taxpayers of the burden of supporting an indigent child.[41] It is likely that the concern of the court in *McCollum*—cost "to the state" vs. restitution to the state—has served only to illuminate a problem which is destined to become more acute with the passage of the federal measure.

C. *Contracting to Hold Marital Property as Tenants in Common*

In Mississippi, a decree of divorce, in itself, does not affect title to property held by the parties before divorce.[42] However, property conveyed to husband and wife as tenants by the entirety becomes a joint tenancy with right of survivorship following a decree of divorce.[43] In

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[39] *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984). The amendments were appended to part D of Title IV of the Social Security Act, 42 U.S.C. §§ 651-65 (Supp. 1984).

[40] *McCollum*, 447 So. 2d at 653-54. The court made the following observation:

> In this case McCollum was represented by a tax-supported legal aid service. A symbiotic relationship thus exists between a tax-supported Department of Public Welfare legal section which enforces child support and a tax-supported legal aid servce defending natural fathers in such suits. If a child custody suit ensues, no doubt the natural mother on public welfare will require the assistance of yet another tax-supported legal aid service, a three-way symbiotic relation supported not by the laws of nature, but by the laws of our society.
>
> In the absence of judicial activism, this Court can do no more than state the facts. Upon remand this case may well become a *menage a trois*.

Id.

[41] *Id.* at 653.

[42] *See, e.g.*, Miller v. Miller, 298 So. 2d 704, 706-07 (Miss. 1974)(property held as joint tenants before divorce remained so held after divorce decree). *See generally* J. BUNKLEY & W. MOSE, *Amis on Divorce and Separation in Mississippi* § 16.05 (1957)(discussing conclusiveness of divorce decree as to common property rights); N. HAND, MISSISSIPPI DIVORCE, ALIMONY AND CHILD CUSTODY § 12-1 (1981)(discussing general rules as to division of property).

[43] Shepherd v. Shepherd, 336 So. 2d 497, 499 (Miss. 1976)(property owned by husband and wife as tenancy by entirety becomes joint tenancy with right of survivorship upon divorce).

Blue v. Blue,[44] the parties intended to become tenants in common by incorporating a property settlement into a divorce decree.

While their marriage was in force, real property, including a residence, was conveyed by warranty deed to Ronald Blue and his wife, Karen, as an estate by the entirety.[45] The parties subsequently agreed to terminate the marriage. The divorce decree incorporated an agreement between the parties which gave possession of the residence to Karen for six months, following which the property would be sold or partitioned.[46] Ronald Blue died intestate during the six-month period and his heirs at law instituted a suit for partition.[47] The chancellor upheld the divorce decree's property settlement in favor of Ronald's heirs, and Karen appealed.[48]

On appeal, the Mississippi Supreme Court affirmed the chancellor's ruling concluding that the Blues had intended the property to be owned as a tenancy in common, each with an undivided one-half interest, subject only to Karen's right of possession for six months.[49]

In Mississippi, a court is without authority to divest a spouse of his or her property, although a chancellor may order an equitable distribution of jointly held property in a divorce decree.[50] A chancellor may also order a party to execute a conveyance in accordance with a property settlement incorporated into the divorce decree[51] and may uphold a contract waiving survivorship rights made during the lifetime of a deceased spouse.[52]

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[44] 445 So. 2d 1383, 1384 (Miss. 1984).

[45] *Id.* at 1383. The deed recited an estate by the entirety with right of survivorship and not as tenants in common. *Id.*

[46] *Id.* at 1384.

[47] *Id.* A tenant in common has an absolute right to partition. MISS. CODE ANN. § 11-21-3 (1972).

[48] *Blue*, 445 So. 2d at 1383.

[49] *Id.* at 1384. The court reached this conclusion despite the vagaries in the language of the property settlement. The court concluded that the divorce decree had terminated the Blues' marriage, their tenancy by the entirety, and any existing joint tenancy. *Id.*

[50] *See, e.g.*, Bond v. Bond, 355 So. 2d 672, 673 (Miss. 1978)(upholding chancellor's conclusion that wife had no equitable interest in property obtained by husband without use of joint funds); Bridges v. Bridges, 330 So. 2d 260, 263 (Miss. 1976)(reversing chancellor's order for husband to sell existing home held as tenants in common and to build new home).

[51] *See* Wray v. Langston, 380 So. 2d 1262, 1263 (Miss. 1980)(upholding execution of quitclaim deed conveying home to wife pursuant to oral agreement incorporated into divorce decree).

[52] *See* Roberts v. Roberts, 381 So. 2d 1333, 1335 (Miss. 1980)(interpreting separation and property settlement agreement made during decedent's lifetime to be waiver of survivorship rights).

In *Blue*, the parties were allowed to convert a tenancy by the entirety into a tenancy in common solely by an agreement incorporated in the divorce decree.[53] Generally, it has been held that since a divorce destroys the unity of the spouses it also destroys the unity of seisin in an estate by the entirety, thereby converting a tenancy by the entirety into a tenancy in common.[54] Mississippi follows a minority rule which is supported by the argument that if marriage cannot change a tenancy in common into a tenancy by the entirety, then a subsequent divorce ought not change a tenancy by the entirety into a tenancy in common.[55] The result in Mississippi is that a divorce converts the tenancy by the entirety into a joint tenancy with right of survivorship.[56] The court's holding in *Blue* thus allows parties to a divorce action to bypass Mississippi's minority rule by incorporating an agreement into the divorce decree.

II. Wills & Estates

A. Cohabitation Does Not Give Rise to an Equitable Life Estate in Decedent's Homestead

The issue in *In re Estate of Alexander*[57] was whether a meretricious relationship precludes equitable relief in favor of the survivor of the relationship, an issue of first impression in Mississippi.

Margie Moye began to live with Sam Alexander while she was still married to George Moye. Margie was never divorced from her husband, but took Sam's name and lived with him as his wife for over thirty years. Margie was considered Sam's wife by members of the community, helped make payments on Sam's house, and cared for Sam until he died.[58] The chancery court granted Margie an equitable life estate in Sam's homestead property.[59] Susie Alexander, Sam's sister and administratrix of his estate, appealed the grant of the life estate.

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[53] *See supra* notes 46-49 and accompanying text.

[54] C. Moynihan, Introduction to the Law of Real Property 232 (1962)(divorce converts tenancy by the entirety into tenancy in common); *see* Donegan v. Donegan, 103 Ala. 488, 15 So. 823, 823-24 (1894)(deed containing no declaration as to parties' interests held to be a tenancy by entirety, which divorce converted).

[55] *See* Hemingway v. Scales, 42 Miss. 1, 17 (1868); *see also, e.g.*, Roulston v. Hall, 66 Ark. 305, 50 S.W. 690, 692 (1899)(estate by entirety not destroyed by divorce); O'Malley v. O'Malley, 272 Pa. 528, 116 A. 500, 502 (1922)(same).

[56] Shephard v. Shephard, 336 So. 2d 497, 499 (Miss. 1976).

[57] 445 So. 2d 836, 838 (Miss. 1984).

[58] *Id.* at 837-38.

[59] *Id.* at 837.

The Mississippi Supreme Court reversed and rendered.[60] The court's opinion focused primarily on the absence of any understanding between Margie and Sam that Margie was to be compensated for her services.[61] The court cited *Marvin v. Marvin*,[62] a well-known California "palimony" case which involved a similar issue. The California Supreme Court in *Marvin* indicated that a tacit understanding between the parties to a meretricious relationship as to some expected compensation could form a basis for recovery.[63] Although the Mississippi Supreme Court neither expressly adopted nor rejected the *Marvin* theory, it noted that there was no such understanding between the parties in *Alexander*.[64] The record in *Alexander* was barren of any evidence of an oral or implied obligation or contract between the parties.[65]

In this regard, *Alexander* follows the rationale of the Mississippi Supreme Court's decision in *Hoyle v. Smith*,[66] in which the court denied the compensation claim of a woman who had cared for her elderly infirm sister during the sister's last years. The *Hoyle* court stated that "[t]he claim . . . might naturally arouse one's sympathy and appeal to one's sense of justice. But there can be no obligation on the part of the estate here proceeded against in the absence of least of an implied obligation or contract."[67] The question of whether the court would fashion a remedy where the parties do have a tacit understanding as to some compensation was left open since no such understanding existed between Sam and Margie.[68]

The court also found that no marriage ceremony had even been attempted in *Alexander*.[69] The court thereupon distinguished two of its previous decisions in which the court had upheld equitable awards

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[60] *Id.* at 840. The doctrine of common law marriage was not raised in *Alexander* since common law marriages were abolished as of April 5, 1956. *Id.; see* MISS. CODE ANN. § 93-1-15 (1972)(requiring license for marriage to be valid).

[61] *In re* Estate of Alexander, 445 So. 2d at 838-40.

[62] 18 Cal. 3d 660, 675, 557 P.2d 106, 116, 134 Cal. Rptr. 815, 825 (1976).

[63] *See id.* at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 831-32. The *Marvin* court stated that when the conduct of the non-marital partners indicated a contract or tacit understanding, the principles of constructive trust, resulting trust, or quantum meruit could be used to compensate for the value of services. *Id.*

[64] *In re* Estate of Alexander, 445 So. 2d at 839.

[65] *Id.* at 838, 840.

[66] 113 Miss. 729, 736, 74 So. 611, 613 (1917).

[67] *Id.* at 733, 74 So. at 612.

[68] *In re* Estate of Alexander, 445 So. 2d at 838; *see supra* notes 61-65 and accompanying text; *cf.* Carnes v. Sheldon, 109 Mich. App. 204, 216-17, 311 N.W.2d 747, 753 (1981)(deferring to legislature questions arising from unmarried cohabitation).

[69] *In re* Estate of Alexander, 445 So. 2d at 839.

of alimony where actual, though invalid, marriage ceremonies had been entered into in good faith, from which the parties had subsequently sought a divorce.[70] Noting the absence of a marriage ceremony and the fact that Sam could have provided for Margie by contract, will or deed but did not do so, the *Alexander* court denied equitable relief.[71]

Instead, the court expressly approved the view of a Michigan appellate court which concluded that questions arising from unmarried cohabitation were best decided by the state legislature.[72] The court in *Alexander* thereby effectively affirmed the legislature's erasure of all traces of the common-law marriage doctrine in Mississippi.

Justice Dan M. Lee, writing for four dissenting justices, quoted extensively from equity jurisprudence in arguing to uphold the chancellor's decision.[73] Justice Lee stated that this was a case in which the

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[70] In Taylor v. Taylor, 317 So. 2d 422 (Miss. 1975), a man and a woman had married and lived together as husband and wife for 18 years, despite a previous marriage of the woman which had never been dissolved by divorce or death. Upon dissolution of the parties' marriage, the chancellor ordered, and the supreme court affirmed, the man to make support payments for 36 months to the woman. The court was careful not to designate the support as alimony. Principle of equity governed the court's decision. *Id.* at 422-23.

The complainant and the defendant in Chrismond v. Chrismond, 211 Miss. 746, 52 So. 2d 624 (1951), had married and lived together as husband and wife for eight or nine years despite the defendant having a living wife undivorced. The joint efforts and funds of the parties produced a substantial amount of real property. *Id.* at 747, 52 So. 2d at 625. Upon dissolution of their marriage, the woman requested and was granted an equitable share of the property accumulated by their joint efforts while living together as husband and wife. *Id.* at 747, 52 So. 2d at 630.

[71] *In re* Estate of Alexander, 445 So. 2d at 839-40. The *Alexander* court further distinguished *Chrismond* and *Taylor* on the ground that in those two decisions the suit had been against a living person, whereas in *Alexander*, the suit was an attempt to collect from the estate of a deceased person. *Id.* at 839.

[72] *Id.*; *see* Carnes v. Sheldon, 109 Mich. App. 204, 216-17, 311 N.W.2d 747, 753 (1981). The *Carnes* court stated:

> We are of the opinion that public policy questions of such magnitude are best left to the legislative process, which is better equipped to resolve the questions which inevitably will arise as unmarried cohabitation becomes an established feature of our society. While the judicial branch is not without power to fashion remedies in this area [citations omitted], we are unwilling to extend equitable principles to the extent plaintiff would have us do so, since recovery based on principles of contracts implied in law essentially would resurrect the old common-law marriage doctrine which was specifically abolished by the Legislature. Although, as previously noted, the *Marvin* Court denied that the effect of its decision would be to resurrect the principle of common-law marriages, commentators have been less certain.

Id.

[73] *In re* Estate of Alexander, 445 So. 2d at 840-43 (Dan M. Lee, J., dissenting)(citing

court's well-intentioned efforts to promote adherence to a rule of law resulted in a "travesty of justice."[74]

B. Limitation on Holding Bank in Contempt of Court Order

In *Mississippi Bank v. Kelly*,[75] the Mississippi Supreme Court found that the Mississippi Bank could not be held in contempt of court when it disbursed estate funds since the bank was not a party to the decree prohibiting disbursement.

Steve Kelly, Sr., was named guardian of his minor son's estate, which consisted solely of an unliquidated claim for damages.[76] The guardianship required that Steve Kelly, Sr., post a $50,000.00 guardian's bond.[77] The claim was thereafter settled for $100,000.00 and that amount was deposited in the Mississippi Bank.[78] Steve Kelly, Sr., subsequently petitioned for and was granted a waiver of the guardian's bond. His attorney delivered a certified copy of the decree to the bank. The decree also provided that no disbursements were to be made except on direct order of the court.[79] Steve Kelly, Sr., made unauthorized withdrawals totalling $8,150.00.[80]

After Steve Kelly, Sr., died, Rebecca Kelly was appointed general

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V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE §§ 32, 43, 615 (2d ed. 1950)). The dissenters justified their argument for equitable relief on the ground that "the chancellor did what a decent regard for the sensibilities of humanity demanded." *In re* Estate of Alexander, 445 So. 2d at 842 (quoting Taylor v. Taylor, 317 So. 2d 422, 423 (Miss. 1975)). Justice Lee also pointed to the chancellor's finding that Sam and Margie were not married because they erroneously believed that Margie could not obtain a divorce from her husband since he deserted her and his address was unknown. *In re* Estate of Alexander, 445 So. 2d at 841, 842.

[74] *In re* Estate of Alexander, 445 So. 2d at 840, 842 (Dan M. Lee, J., dissenting).

[75] 445 So. 2d 849, 851 (Miss. 1984).

[76] *Id.* at 849. The claim was for damages arising out of injuries sustained by the son as a result of an overdose of Demerol administered to the son while he was a patient at Hinds General Hospital. *Id.*

[77] *Id.* Every guardian, including parents, must post a bond payable to the state. MISS. CODE ANN. § 93-13-17 (1972 & Supp. 1984).

[78] *Kelly*, 445 So. 2d at 850. The money was deposited into three separate accounts styled "Steve R. Kelly, Sr., guardian of S. R. Kelly, Jr." Authorized signatures were Steve R. Kelly, Sr., and his attorney. *Id.*

[79] *Id.* The decree recited "that the entire assets of the minor's estate remain in Mississippi Bank . . . until such further order of this court shall be entered from time to time, and that no disbursements or withdrawals be permitted except upon direct order of this court." *Id.* MISS. CODE ANN. § 93-13-17 (Supp. 1984) permits bond to be waived in the court's discretion if the estate assets are deposited in a fully insured bank and the bank receives proper notice. For a recitation of the statutory language, see *infra* note 84.

[80] *Kelly*, 445 So. 2d at 850.

guardian of the estate. She filed a motion for citation of contempt against the Mississippi Bank alleging that the bank had violated the court order by allowing Steve Kelly, Sr., to make withdrawals without a court order.[81] The chancery court held the bank in contempt and ordered it to pay $8,150.00 to the estate in order to purge itself of contempt.[82]

The Mississippi Supreme Court reversed, holding that the bank could not be bound by the order since it was not made a party to the action.[83] Mrs. Kelly argued that the bank was bound by the chancellor's order since the chancellor's decree waiving the guardian's bond was made pursuant to Mississippi Code section 93-13-17, which required that the depository bank be provided a certified copy of the order.[84] The court, citing *Sinquefield v. Valentine*,[85] held that the statute could not dispense with notice and the opportunity for a hearing as required by the due process clauses contained in the state and federal constitutions.[86] The judgment of the chancery court was vacated with-

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[81] *Id.*

[82] *Id.* at 849.

[83] *Id.* at 851.

[84] *Id.* at 850. MISS. CODE ANN. § 93-13-17 (Supp. 1984) provides, in pertinent part:

> A guardian need not enter into bond, however, as to such part of the assets of the ward's estate as may, pursuant to an order of the court in its discretion, be deposited in any banking corporation, building and loan association or savings and loan association in this state so long as such deposits are fully insured, such deposits there to remain until the further order of the court, and a certified copy of the order for deposit having been furnished the depository and its receipt acknowledged.

Id. It was undisputed that the bank had received a copy of the order. *Kelly*, 445 So. 2d at 850.

[85] 159 Miss. 144, 132 So. 81 (1931). *Sinquefield* involved a chancery court child custody suit brought by the children's grandparents, of which suit the parent was given no notice or an opportunity to be heard. The chancellor nevertheless entered a decree in favor of the grandparents. The supreme court reversed, holding that a chancellor's decree was not binding on a party who had no notice or opportunity to be heard. *Id.* at 152, 132 So. at 83.

[86] *Kelly*, 445 So. 2d at 850-51. The due process clause of the Mississippi Constitution states that "[n]o person shall be deprived of life, liberty, or property except by due process of law." MISS. CONST. art. 3, § 14. The federal Constitution contains a similar provision. *See* U.S. CONST. amend. XIV. The *Sinquefield* court stated:

> Where a statute does not expressly provide for notice and a hearing, other statutes must be looked to, and the process authorized under them should be had before a decree or judgment can be entered. The Legislature cannot dispense with such notice. The court, in all cases, must proceed upon notice and inquiry. It must hear before it can adjudge, and it must give an opportunity to persons affected by the judgment to be heard before it is rendered, or else the judgment does not affect them.

out prejudice.[87]

After *Kelly,* when a guardian applies for waiver of a bond over the assets of his ward's estate, the depository bank must be made a party to the action in order to bind it to the court's decree.[88] If not made a party, the bank cannot be held accountable for disbursing estate funds to a guardian who withdraws those funds in violation of a court decree and his fiduciary duty.[89]

C. Standard to be Applied in Conservatorship Proceedings

In 1962, the Mississippi Legislature established a conservatorship procedure designed to protect the assets of persons who, by reason of advanced age, physical incapacity, or mental weakness, are rendered incapable of managing their own estates.[90] A conservatorship proceeding provides protection for an individual's assets without the stigma of legally declaring the person non compos mentis.[91]

Sinquefield, 159 Miss. at 152, 132 So. at 83.

The issue arose again in Sinquefield v. Valentine, 160 Miss. 61, 133 So. 210 (1931), when the father was held in contempt for failing to surrender the children. Since the supreme court found the custody decree in the previous case void for failure to give the father an opportunity to be heard, the chancellor was without power to hold the father in contempt. *Id.* at 64-65, 133 So. at 211; *accord* McKinney v. McKinney, 374 So. 2d 230, 232 (Miss. 1979)(voiding chancellor's contempt order because service of process void).

[87] *Kelly,* 445 So. 2d at 851.

[88] *See supra* notes 83, 86 and accompanying text.

[89] *Kelly,* 445 So. 2d at 851. A question not raised by Mrs. Kelly on appeal was whether the bank, having notice of the order, could be charged with aiding Steve Kelly, Sr., in violating his fiduciary duty. *See id.* at 849-51; *see also* RESTATEMENT (SECOND) OF AGENCY § 312 (1958)(one who intentionally assists agent in violating duty to principal is subject to liability to principal).

[90] *See* MISS. CODE ANN. §§ 93-13-251 to -267 (1972 & Supp. 1984)(establishing conservatorship procedure). The conservatorship procedure provides, in pertinent part:

> If a person by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate, the chancery court of the county wherein such person resides may, upon the petition of such person or of one or more of his friends or relatives, appoint a conservator to have charge and management of the property of such person, and if the court deems it advisable, also to have charge and custody of the person subject to the direction of the appointing court.

Id. § 93-13-251 (1972). At the hearing to determine whether a conservator is required, the chancellor has broad discretion as to the number and character of the witness and the proof to be presented. The evidence must include, however, a written certificate made by two physicians, or one physician and one psychologist, which states the results of a personal examination made by each physician or psychologist. *Id.* § 93-13-255 (1972).

[91] Initiation of a conservatorship proceeding does not require determination of in-

In *Harvey v. Meador,*[92] the Mississippi Supreme Court was confronted with having to determine the appropriate legal standard to be applied in conservatorship proceedings, an issue not previously addressed by either the court or the legislature.[93] The issue arose when Guy and Joseph Harvey appealed the chancellor's denial of their petition to be appointed co-conservators of the estates of their elderly uncles.[94] They argued that the chancellor's findings were manifestly in error and against the overwhelming weight of the evidence.[95] The Mississippi Supreme Court agreed, reversed the chancellor's decision, and adopted a "management competency" test as the standard to be applied in conservatorship proceedings.[96]

Noting the absence of any statutory description of the three conditions which permit appointment of conservators,[97] the court directed that the management competency test be applied as a legal standard by the trier of fact.[98] The court concluded that a court's jurisdiction to take property involuntarily is based only on the manifestation of an inability to manage property, although an individual's physical weakness may be a significant factor.[99] According to the court, the management competency test can be applied by considering evidence which is probative of ability to manage, improvident disposition, dissipation of property, susceptibility to influence or deception by others, or similar factors.[100]

During the pendency of the appeal, three of the Harvey's four uncles died.[101] Therefore, the court addressed only the competency of the

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competency or the existence of a legal disability. Harvey v. Meador, 459 So. 2d 288, 292 (Miss. 1984). Once the protective procedures have been established, however, the duties, responsibilities, and powers of a conservator are the same as those of a guardian. *Id.; see also* UNIFORM PROBATE CODE § 5-304 Comment (1975)(purpose of guardianship to provide for care of person unable to care for himself); *cf.* Robertson, *The Uniform Probate Code: An Opportunity for Mississippi Lawyers to Better Serve the Weak and Grieving,* 45 MISS. L.J. 1, 12 (1974)(comparing trustees with conservators and guardians).

[92] 459 So. 2d 288 (Miss. 1984).

[93] *Id.* at 292.

[94] *Id.* at 290. The uncles for which Guy and Joseph Harvey sought conservatorship were elderly brothers, ranging in age from 80 to 93. *Id.*

[95] *Id.*

[96] *Id.* at 292.

[97] *See supra* note 90 and accompanying text.

[98] *Harvey,* 459 So. 2d at 292.

[99] *Id.; see also* Atkinson, *Towards a Due Process Perspective in Conservatorship Proceedings for the Aged,* 18 J. FAM. L. 819, 821-33 (1980)(variations of conservatorship statutes; defining interest present in conservatorship proceedings).

[100] *Harvey,* 459 So. 2d at 292.

[101] *Id.* at 290. The chancery court found the issue moot as to the three deceased

surviving uncle, Louis Meador. At the time of the hearing, Louis Meador was eighty-two years old and lived as a hermit in a boarded-up house which was without either electricity or water. His responses to questions asked at the conservatorship proceedings evidenced no understanding of his estate or business or the legal proceedings to which he was a party.[102] The court concluded from its reading of the record that Louis suffered from advanced age and mental weakness which resulted in improvident disposition of his property (selling some real estate at far below its market value).[103] Thus, the Mississippi Supreme Court reversed the chancellor's decision as manifestly in error and against the overwhelming weight of the evidence. The case was remanded for an appointment of a qualified conservator.[104]

The significance of the *Meador* management competency test is that it provides a guideline for evaluating facts presented to the chancery court in a conservatorship proceeding. Facts not probative of ability to manage property are irrelevant to the issue of whether or not to appoint a conservator. Given the broad lattitude afforded a chancellor in Mississippi,[105] it is difficult to predict accurately the facts required for reversal of a chancellor's conservatorship ruling.[106] *Meador* has helped define the parameters of competency for purposes of the conservatorship statute. The precise limits of competency required by the statute, however, remain undefined. That boundary must be established by the court in a conservatorship proceeding wherein the conservatorship defendant claims he is competent to manage his estate in spite of claims that a conservatorship is mandated.[107]

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uncles. *Id.* at 293.

[102] *Id.* at 290, 293.

[103] *Id.* at 293. Each of the four uncles owned several hundred acres of land in Wayne County and an undivided one-eighth interest in 320 acres of farm and timber land in Kentucky, which they sold in April, 1982, for about $135.00 an acre. A farmer who rented the land testified at trial that the land was worth between $800.00 and $1000.00 per acre. *Id.* at 290.

[104] *Id.* at 293.

[105] *See* Richardson v. Riley, 355 So. 2d 667, 668 (Miss. 1978)(upholding chancellor's conclusions as to disputed evidence in boundary line dispute); Fayard v. Fayard, 293 So. 2d 421, 423 (Miss. 1974)(upholding chancellor's findings in shareholder derivative action).

[106] Reported cases under Mississippi's conservatorship statute are infrequent. *But see, e.g.,* Majors v. Purnell's Price, Inc., 360 F. Supp. 328, 329 (N.D. Miss. 1973)(appointing conservator for adult accident victim); Lee v. Lee, 337 So. 2d 713, 715 (Miss. 1976)(allowing person of sound mind to execute will though property was under conservatorship).

[107] In deciding the question of the propriety of a chancellor's ruling in such a case, the supreme court would face significant due process concerns. *See* Atkinson, *supra* note

III. INSURANCE

A. *Stacking of Uninsured Motorist Coverages*

Government Employees Insurance Co. v. Brown[108] finally settled the question of stacking uninsured motorist coverages of a motor vehicle liability policy. Prior to *Brown*, "stacking"[109] of uninsured motorist coverage from multiple policies had been allowed in Mississippi.[110] However, where multiple vehicles were insured under one policy, the issue was more difficult.[111] Previous decisions had allowed the stacking of uninsured motorist coverages for multiple vehicles insured within a single policy only when the policy's limit on liability clause was found to be ambiguous.[112] However, the argument that a limitation clause was ambiguous, especially when multiple vehicles are insured under a

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99, at 828-31.

[108] 446 So. 2d 1002, 1003, 1006 (Miss. 1984). The case was certified to the Mississippi Supreme Court by the United States Court of Appeals for the Fifth Circuit pursuant to MISS. S. CT. R. 46. The question certified was "to define and construe the 'limits of liability' clause under uninsured motorist coverage of a motor vehicle liability policy." *Brown*, 446 So. 2d at 1003; *see* Government Employees Ins. Co. v. Brown, 675 F.2d 645, 646, 647 (5th Cir. 1982)(requesting certification). Uninsured motorist coverage is required by statute to be offered with all automobile liability policies. MISS. CODE ANN. § 83-11-101 (Supp. 1984). The Mississippi Motor Vehicle Safety Responsibility Law requires a minimum liability coverage of $10,000 per person and $20,000 per accident. *Id.* § 63-15-11(4)(Supp. 1983).

[109] "Stacking" allows an insured to recover damages up to the limits of coverage under each policy that includes him in its uninsured motorist coverage or to the limits for each vehicle for which a premium was paid. In terms of the actual monetary recovery, stacking is one of the most important aspects of uninsured motorist insurance. *See* Phillips, *A Guide to Uninsured Motorist Insurance Law in Mississippi*, 52 MISS. L.J. 255, 284 (1982).

[110] *See e.g.*, State Farm Mut. Auto. Ins. Co. v. Bishop, 329 So. 2d 670, 672-73 (Miss. 1976)(permitting coverage in two separate polices to be stacked); Southern Farm Bureau Casualty Ins. Co. v. Roberts, 323 So. 2d 536, 537-38 (Miss. 1975)(allowing stacking of three separate policies by same insurer).

[111] *See* Phillips, *supra* note 109, at 288-94; *see also* Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 702 (Miss. 1976)(stacking not allowed for one policy covering four vehicles). *Talbot* was a five to four decision. The dissenting opinion critized the holding for not giving the insured the additional coverage for which he had paid a separate premium, providing the insurance company a windfall. *Id.* at 703-07; *cf.* Southern Farm Bureau Casualty Ins. Co. v. Roberts, 323 So. 2d 536, 537-38 (Miss. 1975)(stacking allowed where three separate policies in force).

[112] *See, e.g.*, St. Arnaud v. Allstate Ins. Co., 501 F. Supp. 192, 194 (S.D. Miss. 1980)(stacking allowed in single policy with ambigious limitation clause); Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267, 270-71 (Miss. 1979)(same; payment of separate premiums not decisive); Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381-82 (Miss. 1977)(same).

single policy, had not always proven successful.[113]

The plaintiff in *Brown* had paid separate premiums for uninsured motorist coverage on three vehicles under a single policy. His policy provided for the payment of damages from injuries caused by the negligence of an uninsured motorist.[114] The plaintiff and his wife were involved in a collision with an alleged uninsured motorist.[115] The question as to whether stacking of the uninsured motorist provisions in the plaintiff's policy would be allowed came to the Mississippi Supreme Court on certification from the United States Court of Appeals for the Fifth Circuit.[116]

In *Talbot v. State Farm Mutual Automobile Insurance Co.*,[117] the Mississippi Supreme Court refused to allow stacking of uninsured motorist coverages where the policy's limitation of liability clause was clear and unambiguous, even though separate premiums were paid on multiple vehicles. The court subsequently allowed stacking in *Hartford Accident & Indemnity Co. v. Bridges*[118] because the policy's limitation clause was ambiguous *and* separate premiums had been paid on multiple vehicles under one policy. In *Brown*, the supreme court expressly adopted the rationale of *Bridges* and rejected that of *Talbot*.[119]

If separate premiums were charged for uninsured motorist coverage, *Bridges* raised the presumption that the insurer intended to pro-

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[113] *See e.g.*, Blansett v. American Employers Ins. Co., 652 F.2d 535, 536-37 (5th Cir. 1981)(separate premiums paid but stacking not allowed where no ambiguity in limitation of liability clause); Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 701-02 (Miss. 1976)(same).

[114] *Brown*, 446 So. 2d at 1007.

[115] *Id.* at 1003. Robert Brown and his wife were riding in a vehicle owned by Robert Brown and insured by Government Employees Insurance Company. They were involved in a collision with the alleged uninsured motorist while approaching an intersection in Moss Point, Mississippi. Mrs. Brown claimed that her damages for personal injuries exceeded $30,000. *Id.* Each of Mr. Brown's three vehicles was insured for a maximum of $10,000 protection for each person against injuries from an uninsured motorist. *Id.* at 1007.

[116] When Mrs. Brown made a claim for personal injuries in the amount of $30,000, Government Employees Insurance Company filed an action for declaratory judgment pursuant to the Federal Declaratory Judgment Action, 28 U.S.C. § 2201 (1982), in the United States District Court for the Sourthern District of Mississippi. *Brown*, 446 So. 2d at 1003. Eventually, the plaintiffs appealed a grant of summary judgment in favor of the insurer. *Id.* at 1003-04. The Fifth Circuit then certified the stacking question to the Mississippi Supreme Court. *Brown*, 675 F.2d at 646-47. The supreme court treated the question as requiring interpretation of legislative intent under the uninsured motorist statute. *Brown*, 446 So. 2d at 1005.

[117] 291 So. 2d 699, 702 (Miss. 1974).

[118] 350 So. 2d 1379, 1381-82 (Miss. 1977).

[119] *Brown*, 446 So. 2d at 1006.

vide the insured the same coverage in one policy as would be furnished if such coverage was provided in separate policies covering the same vehicles. Therefore, *Bridges* required any limitation of liability to be in clear and unambiguous language.[120] In *Brown,* the court expanded its reasoning and held that recovery cannot be limited by an insurer as to benefits for which a premium has been paid, regardless of the limiting language.[121] The Mississippi Supreme Court answered the certified question by allowing stacking in either of two instances: (1) where the limits of liability clause, when read together with the declaration sheet showing separate coverages for multiple vehicles, becomes unclear and ambiguous; or (2) where multiple premiums are paid for uninsured motorist coverage on each of several vehicles.[122]

Consequently, a finding at trial that either of the two instances exists will allow an insured to stack his policy's uninsured motorist coverages up to an amount equal to the combined maximum dollar coverage of each vehicle against any actual damages sustained.

B. Uninsured Motorist Coverage

State Farm Mutual Automobile Insurance Co. v. Nester[123] indicated the crucial question in an uninsured motorist action in Mississippi may well be whether a motorist was in fact uninsured. The facts in *Nester* were stipulated. While riding as a passenger in her own car, Mary Nester was injured due to the negligence of Patrick Sullivan, who was driving the car with Mary's consent but against the wishes of Mary's father. The insurance premiums were paid by James Nester, Mary's father, who was the named insured on four separate State Farm automobile policies, each of which carried a $10,000.00 uninsured motorist coverage. The State Farm policy covering the automobile owned by Mary forbade a liability claim against a permissive operator. Sullivan had no independent liability insurance.[124] James and Mary Nester obtained a $40,000 judgment against State Farm based on James' four uninsured motorist policies.[125] State Farm appealed, claiming that the trial court erred as a matter of law because Mary's injuries were caused

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[120] *Bridges*, 350 So. 2d at 1381.

[121] *Brown*, 446 So. 2d at 1006. The court thereby adopted the reasoning of Justice Broom in his dissenting opinion in *Talbot*. *See supra* note 111.

[122] *Brown*, 446 So. 2d at 1006.

[123] 459 So. 2d 787, 789 (Miss. 1984).

[124] *Id.* at 788-89.

[125] *Id.* at 788. The cause was heard by the circuit judge of Harrison County without a jury. *Id.*

by neither an uninsured motorist, an uninsured motor vehicle, nor another and separate motor vehicle owned or operated by one without liability insurance.[126]

On appeal, the Mississippi Supreme Court found no liability insurance applicable to Mary.[127] The court concluded that if any insurance applied, it must be uninsured motorist coverage.[128] Justice Dan Lee framed the issue as "[w]hether an insured who is injured while riding as a passenger in her own car is entitled to recover from her uninsured motorist coverage where the policy expressly forbids her to make a claim based on liability and the driver of the car is otherwise uninsured."[129] The court responded affirmatively and upheld the trial court's $40,000 award.[130]

In deciding *Nester*, all of the Mississippi Supreme Court Justices agreed that the issue should be resolved based upon the state's public policy as expressed by the legislature.[131] That policy requires the uninsured motorist statute to be liberally construed in favor of the insured.[132] The court viewed the situation from the perspective of Mary

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[126] *Id.; see infra* notes 123, 124 and accompanying text.

[127] *Nester*, 459 So. 2d at 789. If Sullivan was a permissive user and insured under James' policy, then Mary was forbidden by the policy terms to make a liability claim. If Sullivan was not a permissive user, then he was uninsured, and no liability insurance applied to the accident.

[128] *Id.* at 789-90. The court quoted the pertinent portions of the Mississippi uninsured motorist statute, which provides that an uninsured motor vehicle includes "[a] motor vehicle as to which there is no bodily injury liability insurance . . ." or "as to which there is such insurance in existence, but the insurance company writing the same *has legally denied coverage thereunder* . . . ." MISS. CODE ANN. § 83-11-103(c)(Supp. 1983)(emphasis supplied by the court). Uninsured motorist insurance must be offered with all bodily injury liability policies. *Id.* § 83-11-101 (1972).

[129] *Nester*, 459 So. 2d at 789.

[130] *Id.* at 793. The court cited Government Employees Ins. Co. v. Brown, 446 So. 2d 1002, 1006 (Miss. 1984), in reaffirming the rule that "where an insured purchases more than one policy and pays the premiums on more than one policy that insured is entitled to collect on all such policies." *Nester*, 459 So. 2d at 793.

[131] *Nester*, 459 So. 2d at 793.

[132] *Id.; see* Stevens v. United States Guar. Co., 345 So. 2d 1041, 1044 (Miss. 1977)(wrecker driver struck by automobile while sweeping debris from highway held injured due to use of wrecker and thereby within the definition of insured); Parker v. Cottonbelt Ins. Co., 314 So. 2d 342, 344 (Miss. 1975)(concluding that insured had not rejected by implication uninsured motorist coverage despite no mention of intent to obtain such coverage); Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 778 (Miss. 1973)(agreeing that clause precluded recovery for injured son of insured, but permitting recovery because exclusion violated statute); Hodges v. Canal Ins. Co., 223 So. 2d 630, 634 (Miss. 1969)(holding uninsured motorist provision to be construed from perspective of injured insured).

Nester and concluded that Patrick Sullivan was an uninsured motorist.[133] The court declared its 1981 decision in *State Farm Automobile Insurance Co. v. Aitken*[134] an unfortunate anomaly in this state's jurisprudence.[135] In *Aitken*, Robin Black was negligently injured by Aitken, her fiance, while he was driving Black's car.[136] Following the subsequent marriage of Black and Aitken, Black lost a suit in which she sought to recover under both liability and uninsured motorist provisions of her State Farm policy.[137] The Mississippi Supreme Court in *Nester* found that the *Aitken* decision was erroneously based on the doctrine of interspousal immunity while failing to mention the applicable cases which held uninsured motorist coverage is to be liberally construed in favor of the insured.[138]

The holding in *Nester* announced no new rule but rather removed any cloud *Aitken* raised over uninsured motorist law in Mississippi. Although higher uninsured motorist premiums may ultimately result, it appears we can expect the court to continue deciding doubtful questions as to uninsured motorist coverage in favor of policy holders,

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[133] *Nester*, 459 So. 2d at 791. Any attempt by the insurer to contractually limit coverage is not effective to narrow the requirements of the statute. *See* Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 772 (Miss. 1973)(voiding exclusion which violated mandatory requirements of statute). The court approved Appleman's view of exclusion clauses:

> It has properly been stated that uninsured motorist protection is not coverage for vehicles but for persons, even though it is contained within a policy otherwise insuring an automobile and that it would be unconscionable to permit an insurer to collect premiums on the one hand and remove protection with the other by redefining "insured" under the UM coverages. If an automobile cannot be insured for the purpose of liability coverages and uninsured for UM coverage, the insurer cannot exclude from the UM coverage a class of persons required to be included under the liability section.

Nester, 459 So. 2d at 733 (quoting J. APPLEMAN, INSURANCE LAW AND PRACTICE BY APPLEMAN § 5080 (1981)).

[134] 404 So. 2d 1040 (Miss. 1981).

[135] *Nester*, 459 So. 2d at 792. The court found that *Aitken* improperly ignored the rule of law that requires the uninsured motorist statute to be liberally construed in favor of the insured, a rule that has been consistently followed since 1969. *Id.; see supra* note 132 and accompanying text.

[136] *Aitken*, 404 So. 2d at 1042.

[137] *Id.* at 1045.

[138] *Nester*, 459 So. 2d at 792; *see supra* note 132 and accompanying text. The court concluded that any language contrary to *Nester* was mere dictum and was expressly disfavored. *Id.* at 793.

thereby expanding the umbrella of uninsured motorist protection in Mississippi.

John Edward Wells, IV

PROPERTY

The Mississippi Supreme Court rendered numerous decisions during the 1984 term which impact upon the law of property. Cases not selected for textual commentary arose in diverse contexts of property law including tax sales,[1] deeds,[2] partition,[3] oil and gas,[4] adverse possession,[5] conversion,[6] the confidential relationship doctrine,[7] liens,[8]

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[1] Levy v. McCay, 445 So. 2d 546, 547-48 (Miss. 1984)(equity has jurisdiction to redeem independent of MISS. CODE ANN. § 27-45-23 (1972); tax sales are to be construed liberally in favor of person seeking redemption); Osborn v. Harrison, 447 So. 2d 122, 123-24 (Miss. 1984)(tax deed set aside because reasonable effort to redeem had been made; title need not be deraigned in initial complaint); Board of Supervisors v. Hattiesburg Coca-Cola Bottling Co., 448 So. 2d 917, 918, 922-23 (Miss. 1984)(covenant by county not to assess ad valorem taxes on property conveyed to county and leased back to private corporation held authorized by law and binding).

[2] Harris v. Kemp, 451 So. 2d 1362, 1364-65 (Miss. 1984)(clear and convincing evidence necessary to prove deed absolute intended as a mortgage; factors for determination); Duane v. Saltaformaggio, 455 So. 2d 753, 757-58 (Miss. 1984)(rare instance where courses and distances prevail over monuments; monuments incorrectly located and in conflict with other primary subdivision markers).

[3] McConnell v. McConnell, 449 So. 2d 785, 786-87 (Miss. 1984)(right of cotenants to partition; in absence of ability to partition in kind, partition by sale mandated); McCormick v. McCormick, 449 So. 2d 1209, 1211 (Miss. 1984)(although statutes fixing place of sales under execution are mandatory, fact that sale was conducted inside front door of courthouse rather than exterior immaterial; acceptance of cashier's check rather than cash required by MISS. CODE ANN. § 13-3-169 (1972) acceptable if in fact converted into cash without prejudice).

[4] Seismic Petroleum Servs., Inc. v. Ryan, 450 So. 2d 437, 439-40 (Miss. 1984)(trespass for running seismic line over property without authorization established); Bourn v. Tomlinson Interest, Inc., 456 So. 2d 747, 748-49 (Miss. 1984)(when grantor warrants greater mineral interest than he owns, attempted reservation is first applied to overextended fraction); Martin v. Winfield, 455 So. 2d 762, 764-66 (Miss. 1984)(elements of fraud not proved by clear and convincing evidence where attorney with oil and gas experience accepted lease in undeveloped area); Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd., 457 So. 2d 1298, 1306, 1312-20, 1326-28 (Miss. 1984)(upheld Rule 48 Ratable Take as applied in context of deregulated gas over allegations that rule violated supremacy, commerce and due process clauses of United States Constitution), *rev'd*, 54 U.S.L.W. 4114 (U.S. Jan. 22, 1986).

[5] Trotter v. Gaddis & McLaurin, Inc., 452 So. 2d 453, 457-58 (Miss. 1984)(possession must be sufficient to put another on actual or imputable notice; however, adverse possessor can not be divested of title by events subsequent to the ripening of title); Skelton v. Lewis, 453 So. 2d 703, 707 (Miss. 1984)(grantor attempting to establish adverse possession against grantee must prove actual notice beyond reasonable doubt); Gadd v. Stone, 459 So. 2d 773, 774 (Miss. 1984)(finding insufficient evidence to support adverse possession where there had been joint and permissive use of property).

trusts,[9] expansion,[10] tenancy by the entirety,[11] drainage,[12] contracts,[13] personal jurisdiction,[14] restrictive covenants,[15] and eminent domain.[16]

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[6] Gold v. LaBarre, 455 So. 2d 739, 747-48 (Miss. 1984)(central issue of conversion is legal entitlement to property; attorney's responsibility to disclose parties he represents in multiple person transaction).

[7] Patterson v. Merchants Truck Line, Inc., 448 So. 2d 288, 290-91 (Miss. 1984)(confidential or fiduciary relationship between parties to a deed raises presumption of invalidity; burden of proving relationship is on party asserting it; threat of legal process wherein there was right to such action did not constitute duress sufficient to set aside deed); Peterman v. Peterman, 447 So. 2d 126, 128 (Miss. 1984)(evidence clearly established confidential relationship); Murray v. Laird, 446 So. 2d 575, 578-79 (Miss. 1984)(recognizing factors to overcome presumption of undue influence arising from confidential relationship).

[8] Tuggle v. Williamson, 450 So.2d 93, 95 (Miss. 1984)(Mississippi follows common-law rule that courts are without power to impose attorney's lien on real property; sale to enforce lien was therefore invalid).

[9] Medders v. Ryle, 458 So. 2d 685, 688-89 (Miss. 1984)(transfer of property by one person with purchase price paid by another raises a resulting trust in favor of payor; signature of wife as "mortgagor" on purchase money loan insufficient to establish trust beyond a reasonable doubt).

[10] *In re* Extension of the Boundaries of Clinton, 450 So. 2d 85, 89 (Miss. 1984)(criteria for municipal expansion: reasonable path of expansion, potential health hazards, city's financial ability to make promised improvements); Western Line Consol. School Dist. v. City of Greenville, No. 55,337, slip op. at 3 (Miss. 1984)(reasonableness of city's actions in passing municipal ordinance enlarging or contracting municipal boundaries is judicial function of chancery court), *withdrawn*, 465 So. 2d 1057 (Miss. 1985).

[11] Blue v. Blue, 445 So. 2d 1383, 1384 (Miss. 1984)(property settlement evidenced intent that tenancy by the entirety become a tenacy in common upon divorce). For a discussion of the *Blue* case, see generally *1984 Supreme Court Review: Miscellaneous*, in this issue.

[12] Harris v. Buxton T.V. Inc., 460 So. 2d 828, 835 (Miss. 1984)(upper landowner is liable to downhill neighbors for damages caused by his unreasonable and inequitable behavior if he fails to act prudently to safeguard the correlative interests of his neighbors in anticipating drainage from alteration of his property and failing to take ameliorative steps); Dethlefs v. Beau Maison Dev. Corp., 458 So. 2d 714, 716-17 (Miss. 1984)(failure to demonstrate absence of material issue of fact as to existence of drainage easement created triable issue; summary judgment was error).

[13] Frazier v. Northeast Miss. Shopping Center, Inc., 458 So. 2d 1051, 1054 (Miss. 1984)(contracts are to be construed with fairness and reasonableness; in lease option, time is of essence, and failure to give timely notice will cause option to expire).

[14] First Miss. Nat'l Bank v. S & K Enters., 460 So. 2d 839, 841-42 (Miss. 1984)(in proceeding to foreclose deed of trust, California interior designer, hired to supervise renovation of building in Mississippi, who executed a personal guaranty to secure the Mississippi loan, was subject to personal jurisdiction in Mississippi courts pursuant to MISS. CODE ANN. § 13-3-57).

[15] Kinchen v. Layton, 457 So. 2d 343, 345-46 (Miss. 1984)(Mississippi law favoring free and unobstructed use of real property provides that restrictive covenants are to be construed strongly against person seeking enforcement; provision enforceable if ex-

I. Equitable Estoppel Applied to the Statute of Frauds

In *PMZ Oil Co. v. Lucroy*,[17] the Mississippi Supreme Court equitably estopped a subdivision developer from violating unrecorded protective covenants restricting land use.[18]

PMZ Oil Co., a Mississippi corporation planning to develop an exclusive residential subdivision, prepared a subdivision plat for Raintree Subdivision.[19] Although this plat was never approved nor recorded,[20] lots were sold pursuant to it.[21] Each lot was conveyed subject to a protective covenant restricting use to one residential dwelling.[22] After the protective covenants were explained to them, the Lucroys purchased the third lot sold[23] and constructed their home.[24] After four other lots had been conveyed subject to the covenants, PMZ advised residents of its intent to build six townhouse condominiums on one of the remain-

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pressed in unambiguous language). *See infra* notes 17-18, 27-29, and accompanying text (equitable estoppel from violation of unrecorded protective covenants).

[16] Mississippi Power & Light Co. v. Conerly, 460 So. 2d 107, 110-111, 113 (Miss. 1984)(pursuant to Miss. Code Ann. § 11-27-15 (1972), Special Court of Eminent Domain has power to dismiss condemnation proceeding for certain reasons, particularly finding of "no public necessity"; right to exercise power of condemnation is strictly limited to purposes specified in statute; any doubt is to be resolved in favor of landowner; court had ample evidence to find that no Mississippi customer would be served from transition line; therefore, dismissal of condemnation for lack of public necessity was affirmed).

[17] 449 So. 2d 201 (Miss. 1984).

[18] *Id.* at 208-09. Since no prior Mississippi decision had invoked the doctrine in this particular situation, the court relied upon the general concepts of equitable estoppel. *Id.* at 206. *See infra* notes 46-47, 56 and accompanying text (reliance on general concepts).

[19] *Lucroy*, 449 So. 2d at 203. Having acquired property in Warren County, PMZ engaged professional surveyors to prepare a plat subdividing the property into sixteen lots each exceeding one acre. *Id.*

[20] *Id. See* Miss. Code Ann. § 17-1-23 (1972)(power of local authorities to regulate subdivisions); *id.* at §§ 19-27-21 to -34 (1972)(requirements for plats).

[21] *Lucroy*, 449 So. 2d at 203.

[22] *Id.* The deeds contained thirteen covenants; the one of critical importance provided that "no more than one (1) residence shall be built on a lot." *Id.*

[23] *Id.* The Lucroys, having learned of the proposed subdivision, engaged a real estate broker to act on their behalf. The broker contacted Murray Pinkston, the primary actor for PMZ, who displayed the plat to the broker and explained the protective covenants intended to be imposed within the subdivision. Pinkston reiterated that only single-family dwellings would be allowed and subsequently explained the covenants to Mr. Lucroy. The Lucroys' deed contained the protective covenants. *Id.* at 202-03.

[24] *Id.* At the time construction was begun, the Lucroys knew of the covenants through Mr. Lucroy's and the broker's conversations with Pinkston and from the terms of their warranty deed. The deeds to the lots on either side of their lot were recorded subject to the same covenants. *Id.*

ing lots.[25] The Lucroys filed a bill of complaint, and the chancery court subsequently enjoined the construction.[26]

On appeal to the Mississippi Supreme Court, PMZ asserted a statute of frauds defense.[27] The court, however, held equitable estoppel to be a "well-established exception" to the Mississippi statute[28] and affirmed.[29]

The statute of frauds is one of the most established statutes existing in Mississippi law,[30] but throughout its history the Mississippi Supreme Court, while denying its power to engraft exceptions to the statute,[31] has recognized exception after exception.[32] The inconsisten-

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[25] *Id.* at 204. The residents, refusing to consent to the construction, asserted that the protective covenants were binding on PMZ and subsequent purchasers of the lots. *Id.*

[26] *Id.* The chancery court ordered PMZ to record the restrictive covenants as running with the remaining land. *Id.*

[27] *Id.* at 206. Section 15-3-1 of the Mississippi Code provides in pertinent part:

> An action shall not be brought whereby to charge a defendant or other party . . . . (c) upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year . . . unless the promise or agreement upon which such action may be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.

MISS. CODE ANN. § 15-3-1 (1972).

[28] *Lucroy,* 449 So. 2d at 206. The court stated that where the elements of equitable estoppel are present, the statute does not bar enforcement of an agreement. *Id.*

[29] *Id.* at 209.

[30] *See* STAT. MISS. TERR., Frauds and Perjuries, art. 1, § 1 (1816)(Act of November 18, 1803, requiring action to charge any person upon a contract for sale of land, tenements, hereditaments or making of a lease for more than a year to be based on writing signed by the party to be charged). Under English common law, ceremonies had been developed to pass interest in property: livery for corporeal and deed for incorporeal, but courts in equity, although cautious of parol agreements for land, would disregard the ceremony if there was consideration. The statute of 29 Car. II, c. 3, however, commanded that an agreement for land by parol, not signed by the parties, could not be executed. 1 H. BALLOW, A TREATISE OF EQUITY, 22-23 (rev. ed. 1793). The Mississippi statute of frauds is clearly based on the English statute which provided that a lease estate in land created only by livery of seisin or parol be construed as an estate at will and that any assignment, grant, or surrender of interest in a freehold hereditament be invalid unless it be in writing and signed by the granting party or his lawfully authorized agent. *See* 2 W. BLACKSTONE, COMMENTARIES 297 (Edward Christian 1818)(effect of 29 Car. II, c. 3). *Cf. supra* note 27 (Miss. statute of frauds).

[31] *See* Gulf Refining Co. v. Travis, 201 Miss. 336, 384, 30 So. 2d 398, 401 (1947)(court has consistently declined to make exceptions to the statute of frauds); Tanner v. Walsh, 184 Miss. 147, 157, 183 So. 278, 279 (1938)(no power to engraft exceptions to statute of frauds); Fisher v. Kuhn, 54 Miss. 480, 483 (1877)(settled doctrine of court not to accept part performance or any other thing as exception); Gothard v. Flynn, 25 Miss. 58, 63 (1852)(adhere to statute of frauds requirements in all cases); Box v. Stan-

cies stem from fear that as the statute is enforced for the prevention of fraud and perjury[33] it will be manipulated to perpetuate these very evils.[34] *Box v. Stanford*[35] warned the judiciary, however, that to allow one equitable exception to the statute would open the door for a series of exceptions.[36] The *Box* court found relief from the strict terms of the statute to be within the province of the legislature.[37]

In keeping with this mandate not to create exceptions to the statute, the Mississippi Supreme Court has refused to recognize part performance[38] and estoppel by deed[39] as exceptions to the statute of

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ford, 21 Miss. (13 S. & M.) 93, 96 (1849)(where statute has no exceptions, the court has no power to create any); Beaman v. Buck, 17 Miss. (9 S. & M.) 207, 210 (1848)(not for court to create exceptions to statute where none exist).

[32] *See infra* notes 35-41 and accompanying text (exceptions).

[33] *See* Tanner v. Walsh, 184 Miss. 147, 158, 183 So. 278, 279 (1938)(purpose of statute to prevent frauds and perjuries). The reenactment of the original Mississippi statute was in fact entitled "An Act to Prevent Frauds and Perjuries." CODE OF MISS. ch. 47, art. 1(1)(Hutchinson 1948). In Reid v. Horne, 187 So. 2d 316 (Miss. 1966), the Mississippi Supreme Court found it wise to require contracts for the sale of land to be in writing "so that errors due to the frailty of human memory, or honest misunderstanding, as well as those resulting from downright fraud, may be obviated." *Id.* at 318.

[34] *See* Sanders v. Dantzler, 375 So. 2d 774, 776 (Miss. 1979)(statute may not be used to shield fraud).

[35] 21 Miss. (13 S. & M.) 93 (1849).

[36] *Id.* In *Box*, a purchaser brought suit for specific performance of a parol contract for the sale of land, alleging fraud by the seller in his failure to reduce the agreement to writing. *Id.* at 95. The Mississippi Supreme Court recognized that English courts had fashioned an exception to the statute of frauds in such a situation but made this observation: "The doctrine which lets in one equitable exception, opens the door for the whole innumerable series. There is no consistent medium course. Either all the equitable exceptions introduced by the English courts must be admitted, or we must adhere to the plain provisions of the statute." *Id.* at 96. The court in Gothard v. Flynn, 25 Miss. 58 (1852), stated that society would benefit from the few departures allowed from the plain meaning of the statute because man would know the established rules of law and be more cautious in making contracts. 25 Miss. at 63.

[37] *Box*, 21 Miss. at 96. *See supra* note 31 (no judicial power to create exceptions).

[38] *See* Reid v. Horne, 187 So. 2d 316, 318 (Miss. 1966)(neither part performance of oral contract for sale of land nor expenditure of money in reliance thereon removed contract from statute of frauds); Wells v. Brooks, 199 Miss. 327, 335-36, 24 So. 2d 533, 534-35 (1946)(part performance no exception); Milam v. Paxton, 160 Miss. 562, 569-79, 134 So. 171, 172 (1931)(same). The Mississippi Supreme Court, in the context of an employment contract not to be performed within fifteen months, held that complete performance by one party of an oral contract unenforceable by the statute of frauds would remove the contract from the statutory bar. Gibbons v. Associated Distribs., Inc., 370 So. 2d 925, 927 (Miss. 1979). *Cf.* 1 H. BALLOW, A TREATISE OF EQUITY, 167-72 (Rev. ed. 1793)(at common law, complete performance by one party to parol agreement for sale of land, executed by delivery of possession accepted by other, removed the contract from statute in that evidence of bargain lay in acts performed, not upon mere words).

frauds. The court has, however, sanctioned the creation of other equitable exceptions to the statute. In *Sanders v. Dantzler*[40] the Mississippi Supreme Court held that promissory estoppel would preclude a statute of frauds defense,[41] although earlier that year it had rejected this argument.[42] The *Sanders* court stated that where one acts to his detriment in reliance on an oral agreement, estoppel can defeat a statute of frauds defense.[43]

Perhaps the best-established equitable exception to the Mississippi statute of frauds is an estoppel to assert title to real property. The Mississippi Supreme Court has repeatedly held that a person who knowingly, and without making his own claim to land known, permits another to expend money on that land under an erroneous opinion of title, will be precluded from asserting his title.[44] A corrollary to this

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[39] *See* Perkins v. Kerby, 308 So. 2d 914, 916-17 (Miss. 1975)(ineffective conveyance by virtue of the statute of frauds). In *Perkins*, the grantor conveyed property to her son as sole grantee, but prior to recording the instrument, the grantee inserted his wife's name and "estate by the entirety" after his name. Upon divorce, the ex-wife asserted an interest in the property although neither grantor nor grantee had signed the addendum. *Id.* at 916. The court found that although estoppel by deed precludes a party from denying the truth of the deed, the statute of frauds barred such a defense. The court stated that it did not believe that estoppel could supply the legal requisites for conveyance where they had been omitted. *Id.* at 917. *Accord* Florida Bank & Trust Co. v. Field, 157 Fla. 261, 25 So. 2d 663, 666 (1946)(estoppel will not effect conveyance of realty where legal requisites are lacking).

[40] 375 So. 2d 774 (Miss. 1979).

[41] *Id.* at 776.

[42] *See* Anderson Constr. Co. v. Lyon Metal Prods., Inc., 370 So. 2d 935, 936-37 (Miss. 1979)(court rejected claim of promissory estoppel where oral bid was within MISS. CODE ANN. § 75-2-201 (1972)(UCC statute of frauds)). For a commentary on *Sanders* and *Anderson*, see *1979 Supreme Court Review: Miscellaneous*, 50 MISS. L.J. 833, 834-39 (1979). The Mississippi Supreme Court also refused to allow the nonstatutory exception in Thomas v. Prewitt, 355 So. 2d 657 (Miss. 1978), where it found the good faith obligation of MISS. CODE ANN. § 75-1-103 (1972) did not require it to recognize a nonstatutory exception to the investment securities statute of frauds. *Thomas*, 355 So. 2d at 661-62. *See generally* MISS. CODE ANN. § 75-8-319 (1972)(investment securities statute of frauds). *See also* FMC Fin. Corp. v. Reed, 592 F.2d 238, 243 (5th Cir. 1979)(citing *Thomas* that under Mississippi law doctrine of promissory estoppel can not cure failure to comply with statute of frauds).

[43] *See Sanders*, 375 So. 2d at 776 (quoting 73 AM. JUR. 2d, *Statute of Frauds* § 565 (1974)). *Cf.* Martin v. Dixie Planing Mill, 199 Miss. 455, 460-64, 24 So. 2d 332, 333-34 (1946)(discussion of promissory estoppel in context of reliance on extension for removal of timber). *See also* RESTATEMENT OF CONTRACTS § 90 (1932)(promissory estoppel).

[44] *E.g.*, Rivervalley Co. v. Deposit Guaranty Nat'l Bank, 331 F. Supp. 698, 708 (N.D. Miss. 1971)(estoppel where party allowed extensive improvements); Board of Educ. v. Page, 456 So. 2d 739, 742 (Miss. 1984)(equitable estoppel applicable against state where state ignored title and collected tax on subject property for seventy years); Hewlett v.

rule is that a person may be estopped by his silence where it constitutes a fraud.[45]

The supreme court in *Lucroy* relied on these two principles of estoppel[46] and thereby extended the judicial exception to the statute of frauds into a new area of law in Mississippi.[47] The court cited *Ute Park Summer Homes Association v. Maxwell Land Grant Co.*,[48] wherein the New Mexico Supreme Court found that "common hon-

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Henderson, 431 So. 2d 449, 453 (Miss. 1983)(estopped from asserting title after allowing home to be constructed); Alabama Great S. Ry. v. McVay, 381 So. 2d 607, 611 (Miss. 1980)(estoppel if owner permitted another to misrepresent title to detriment of third persons); Eastlawn Dev. Co. v. Wells, 311 So. 2d 334, 337 (Miss. 1975)(estopped from receiving damages); Martin v. Franklin, 245 So. 2d 602, 604-05 (Miss. 1972)(estoppel where party watched construction of home); Collier v. King, 251 Miss. 607, 612, 170 So. 2d 632, 635 (1965)(estoppel where party affirmatively misled purchaser into believing he had good title); Quin v. Northside Baptist Church, 234 Miss. 51, 59, 105 So. 2d 151, 154 (1958)(estoppel where party watched construction for fourteen years); Strangi v. Wilson, 223 Miss. 122, 139, 77 So. 2d 697, 702 (1955)(estoppel where party knowingly permitted another to mortgage property); Brock v. Kelly, 208 Miss. 323, 335, 44 So. 2d 452, 455 (1950)(universal rule); Kelso v. Robinson, 172 Miss. 828, 839-41, 161 So. 135, 136-37 (1935)(estoppel where party made no objection to validity of foreclosure); Money v. Ricketts, 62 Miss. 209, 213 (1884)(estoppel where procured purchaser for another); Dickson v. Green, 24 Miss. 612, 616-18 (1852)(estoppel where party induced purchaser to believe he had transferred his interest); *accord* Wendell v. Van Rensselaer, 1 Johns. Ch. R. 344, 354 (N.Y. Ch. 1815)("Qui tacet consentire videtur. Qui potest et debet vetare, jubet."—He who is silent is deemed to consent. He who is able and ought to forbid, commands).

[45] *See* Staton v. Bryant, 55 Miss. 261, 274-275 (1877)(silence operates as estoppel only where it becomes fraud). The court stated that equity refuses to establish a precise definition of fraud "lest knavish ingenuity" evade it; therefore each case must be determined by its own circumstances. *Id.; see also* Resolute Ins. Co. v. State, 290 So. 2d 599, 602 (Miss. 1974)(requirements for estoppel by silence: duty to speak, intentional or negligent disregard by failing to speak, detriment); Collier v. King, 251 Miss. 607, 611-12, 170 So. 2d 632, 634-35 (1965)(owner not required to act or speak regarding title of public record; if he does speak, he must not mislead).

[46] *See Lucroy*, 449 So. 2d at 206 (citing Martin v. Franklin, 245 So. 2d 602 (Miss. 1972) and *Sanders*). The Mississippi Supreme Court has otherwise recognized equitable defenses to the statute of frauds only in specific instances. *See, e.g.*, Delta Lumber Co. v. Wall, 119 Miss. 350, 356-57, 80 So. 782, 784 (1919)(equitable estoppel applicable where company relied on Wall's promise, which was unenforceable by virtue of statute of frauds and thereby failed to establish lien); Higgins v. Haberstraw, 76 Miss. 627, 634-35, 25 So. 168, 169 (1899)(equitable estoppel applicable defensively to shield against fraudulent title acquired by mortgagee in foreclosure violative of parol agreement). *But see* Tanner v. Walsh, 184 Miss. 147, 157-58, 183 So. 278, 279 (1938)(refusal of court to recognize estoppel defense to statute of frauds).

[47] *See Lucroy*, 449 So. 2d at 206 (court's recognition that estoppel had not previously been invoked in this situation).

[48] 77 N.M. 730, 427 P.2d 249 (1967).

esty" dictated that a developer using an unrecorded plat to encourage sales should do what he had represented he would do.[49] The New Mexico court based its decision not on dedication to public use, but on implied grant, implied covenant, or estoppel.[50] In *Sanborn v. McLean*,[51] the Michigan Supreme Court reached a similar result restricting land use by a grantor by implying a reciprocal negative easement to run with the land remaining in the grantor's hands.[52] However, in *Burns v. Baumgardner*[53] the Superior Court of Pennsylvania, in keeping with its decisions that equitable estoppel may not be invoked against the statute of frauds,[54] held that a developer was not estopped from constructing townhouses where other property had been conveyed subject to single-family restrictions.[55]

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[49] *Ute Park*, 427 P.2d at 252-53. In *Ute Park*, the developer prepared a plat which was never recorded and used it in connection with sales. The plat specifically designated areas for a club house and golf course. *Id.* at 251. After a portion of the designated areas were sold without restriction on use, lot owners filed for a mandatory order directing development of the lands. *Id.* at 250. The New Mexico Supreme Court stated that the developer who induced purchasers by use of the plat was required by "common honesty" to act in accordance with his representation. *Id.* at 253. On remand the developer was enjoined from conveying without restriction. *See* Ute Park Summer Homes Ass'n. v. Maxwell Land Grant Co., 83 N.M. 558, 494 P.2d 971, 972, 974 (1972)(injunction on remand).

[50] *See Ute Park*, 427 P.2d at 252 (quoting Cree Meddows, Inc. v. Palmer, 68 N.M. 479, 362 P.2d 1007, 1011, (1961)).

[51] 223 Mich. 227, 206 N.W. 496 (1925).

[52] 206 N.W. at 497. The theory was stated as follows:

> If the owner of two or more lots, so situated as to bear the relations, sells one with restriction of benefit to the land retained, the servitude becomes mutual, and during the period of restraint, the owner of the lot or lots restrained can do nothing forbidden to the owner of the lot sold.

Id. The court found that the easement was operative on any owner having actual or constructive notice of it and found that the subsequent purchaser was on inquiry notice of the easement. *Id.* at 497-98. *But see* Johnson v. Mt. Baker Park Presbyterian Church, 194 P. 536, 539 (Wash. 1920)(rejecting theory that easement could be created without writing and relying instead on equitable principles). For a recent Mississippi decision on covenants running with the land, see Bond v. Lane O' The Hills Maintenance Ass'n, 381 So. 2d 1043 (Miss. 1980).

[53] 303 Pa. Super. 85, 449 A. 2d 590 (1981).

[54] *See* Glasgow v. G.R.C. Coal Co., 295 Pa. Super. 498, 442 A.2d 249, 250 (1981)(estoppel not invoked against statute of frauds); Del Borrello v. Lauletta, 456 Pa. 1, 317 A.2d 254, 255 (1974)(same).

[55] *Burns*, 449 A.2d at 596, 592. In *Burns*, the subdivider developed the tract in phases, phases one and two both having recorded plats with restrictive covenants. At the time of sales of lots in these phases, there was no such plat with restrictive covenants on phase three. When the subdivider attempted to build townhouses in phase three, individual lot owners sued to enjoin the construction. *Id.* at 592. Although the court cited

The *Lucroy* court, relying on equitable estoppel rather than one of the other available theories, chose to extend the exception despite the *Box* warning that a policy of exception would contravene the statute of frauds by promoting fraud.[56] Of equal importance, the court stated that fraudulent intent to deceive is not a necessary element of equitable estoppel.[57] The court, recognizing "loose talk" in previous opinions indicating that fraudulent intent was a requisite for estoppel,[58] stressed that substantial inequity—not fraudulent intent—is the touchstone.[59] The Mississippi Supreme Court established that the only elements of equitable estoppel are change of position in reliance on the conduct of another and detriment suffered as a result of such conduct.[60]

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authority that estoppel could work against the statute of frauds, it found that these rules were contrary to the policy established by the statute and strictly construed the definition of estoppel so that it was inapplicable. *Id.* at 594-95.

[56] *See Box*, 21 Miss. at 96 (quoting Lindsay v. Lynch, 2 Sch. & Lef. 4, on effect of exception on English statute).

[57] *Lucroy*, 449 So. 2d at 207. The court stated that while fraudulent intent to deceive may produce inequity sufficient to operate as an estoppel, estoppel may be enforced in the absence of that intent. *Id.*

[58] *Id.* at 206-07. *See* Perrien v. Mapp, 374 So. 2d 794, 797 (Miss. 1979)(defense of estoppel must show actual fraudulent intent, concealment, and conduct and negligence amounting to fraud in law); Deposit Guaranty Nat'l Bank v. Prudential Ins. Co., 195 So. 2d 506, 511 (Miss. 1967)(intentional false representation or concealment); Crowe v. Fotiades, 224 Miss. 422, 443-44, 80 So. 2d 478, 486 (1955)(conduct or acts amounting to representation or concealment, made with knowledge and intent to produce reliance thereon); Peeler v. Hutson, 202 Miss. 837, 847-48, 32 So. 2d 785, 788 (1947)(same); Barron v. Federal Land Bank, 182 Miss. 50, 61-62, 180 So. 74, 77 (1938)(acts or declarations intended or calculated to mislead); Izard v. Mikell, 173 Miss. 770, 774, 163 So. 498, 499 (1935)(same); Kelly v. Wagner, 61 Miss. 299, 303 (1883)(some element of fraud or intentional wrong); Chew v. Calvert, 1 Miss. (1 Walk.) 54, 62 (1818)(some fraudulent purpose).

[59] *Lucroy*, 449 So. 2d at 207. *See* Izard v. Mikell, 173 Miss. 770, 774, 163 So. 498, 499 (1935)(estoppel in pais arising from manifest inequity; estoppel by conduct arising from intent to mislead).

[60] *Lucroy*, 449 So. 2d at 206. *See* Birmingham v. Conger, 222 So. 2d 388, 392 (Miss. 1969)(estoppel established by change of position in reliance on conduct which causes detriment); *see also* Ivy v. Grenada Bank, 401 So. 2d 1302, 1303 (Miss. 1981)(citing *Birmingham*); Thomas v. Bailey, 375 So. 2d 1049, 1052 (Miss. 1979)(same); Stokes v. American Cent. Ins. Co., 211 Miss. 584, 589-90, 52 So. 2d 358, 360 (1951)(reliance led to injury); Hinds County Water Co. v. Scanlon, 159 Miss. 757, 769, 132 So. 567, 570 (1931)(same).

The Restatement of Property states that "[a]n oral promise or representation that certain land will be used in a particular way, though otherwise unenforceable, is enforceable to the extent necessary to protect expenditures made in reasonable reliance upon it." RESTATEMENT OF PROPERTY § 524 (1944); *see also id.* at comment c (promises by conveyors to induce purchases).

The Mississippi Supreme Court found that the Lucroys had acted reasonably in relying on PMZ's representation to their detriment. *See Lucroy*, 449 So. 2d at 206, 208.

The effect of *Lucroy* on Mississippi property law[61] will be determined by future court decisions as the adequacy of the court's "substantial inequity" analysis[62] is tested against the possibilities of fraud created by the court's extended exception to the statute of frauds[63] and is coupled with the reduced burden of establishing estoppel.[64]

II. Remedy Against Holdover Tenants

In *Mississippi State Department of Public Welfare v. Howie,*[65] the Mississippi Supreme Court recognized section 89-7-25 of the Mississippi Code to be the exclusive damage remedy available to a landlord whose tenant holds over.[66]

In *Howie,* the Mississippi State Department of Public Welfare entered a lease agreement whereby it leased office space from Howie. Prior to the June 30 expiration date, Howie informed the commissioner of the Department of Public Welfare of the approaching expiration date and demanded a surrender of the premises by midnight on the thirtieth.[67] The commissioner responded that the department intended to remain in the leased premises up to sixty days following the expiration to facilitate moving into new offices.[68] Howie then submitted a one-month-carryover lease stating that should the department fail to execute the carryover or vacate the premises by the expiration date, it would be considered a holdover tenant and the present lease would be

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But see Burns, 449 A.2d at 595-96 (intimating that reliance on unrecorded plat might be unreasonable and finding no detriment in that residential nature of subdivision would remain unchanged); Montgomery v. Yarbrough, 192 Miss. 656, 663, 6 So. 2d 305, 308 (1942)(applying Alabama law that party could not reasonably adopt course of action on representation of future intent).

[61] The court expressly stated that its decision would not violate Mississippi recording statutes. The court stressed that an interest in land is not perfected against third persons until recorded pursuant to statute. *Lucroy,* 449 So. 2d at 208. *See* Miss. Code Ann. § 89-5-3 (1972)(interests in land void as to creditors and subsequent purchasers unless properly filed of record); *see also* Restatement of Property § 533 (1944)(protection of recording acts for successors in title of land with restricted use).

[62] *See supra* note 59 and accompanying text (substantial inequity as touchstone).

[63] *See supra* note 56 and accompanying text (extension of doctrine).

[64] *See supra* notes 57-60 and accompanying text (intent to deceive not requisite for equitable estoppel).

[65] 449 So. 2d 772 (Miss. 1984).

[66] *Id.* at 778.

[67] *Id.* at 773. Howie submitted a proposed lease identical to the lease the parties were currently operating under but with an increased rental provision. *Id.*

[68] *Id.* The department disavowed any intent to renew the lease but sought negotiations for a shorter extension. *Id.*

renewed for one year by operation of law.[69] The department occupied the premises, without executing the carryover, until it surrendered the property on July 31.[70] Howie, asserting a renewal of the lease for one year, acknowledged and deposited vouchers from the State of Mississippi for rent for the month of July.[71] On September 30, Howie filed a bill of complaint charging the department as holdover tenant and seeking specific performance of the renewed lease.[72] The chancery court found that the department, by holding over, had renewed the expired lease by operation of law.[73]

On appeal, the Mississippi Supreme Court held the common-law remedy, imposing a renewal of the lease on a holdover tenant, to be abrogated by section 89-7-25 of the Mississippi Code,[74] which provides for the assessment of double rent for the duration of the holding over.[75] The court noted that Mississippi courts developed the renewal remedy despite the availability of the statutory penalty.[76] In *Tonkel v. Riteman*,[77] the Mississippi Supreme Court held that when a tenant holds over, it is the option of the landlord to treat him as a trespasser or as a tenant.[78] The *Tonkel* court found it well established in Missis-

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[69] *Id.* at 773-74.

[70] *Id.* at 774. The commissioner, being without authority to enter a new lease without the approval of the Capitol Commission, stated that he would request the authority to execute the carryover. The Capitol Commission disapproved the proposed amended lease, and the department continued to occupy the premises until July 31. *Id.*

[71] *Id.* at 775. Howie reiterated that he was fully reserving his rights to assert the renewed lease. *Id.*

[72] *Id.* at 773.

[73] *Id.* at 776.

[74] *Id.* at 778. In response to a sovereign immunity defense asserted by the department, the court held that the immunity from suit for breach of contract is waived when the legislature authorizes the state to enter into the contract. *Id.* at 777.

[75] *See* MISS. CODE ANN. § 89-7-25 (1972). Section 89-7-25 provides the following:

> When a tenant, being lawfully notified by his landlord, shall fail or refuse to quit the demised premises and deliver up the same as required by the notice, or when a tenant shall give notice of his intention to quit the premises at a time specified, and shall not deliver up the premises at the time appointed, he shall, in either case, thenceforward pay to the landlord double the rent which he should otherwise have paid, to be levied, sued for, and recovered as the single rent before the giving of notice could be; and double rent shall continue to be paid during all the time the tenant shall so continue in possession.

Id.

[76] *See Howie*, 449 So. 2d at 777 (noting that Tonkel v. Riteman, 163 Miss. 216, 141 So. 344 (1932), *infra* notes 77-79 and accompanying text, was decided under statutory predecessor of section 89-7-25).

[77] 163 Miss. 216, 141 So. 344 (1932).

[78] *Id.* at 219, 141 So. at 344.

sippi that the tenant becomes liable for another year's lease at the same rate and terms as the expired lease.[79]

In *Tepper Brothers v. Buttross*,[80] however, the Mississippi Supreme Court held statutory double rent to be the exclusive remedy for damage from a holdover tenancy.[81] The court stated that where powers are enumerated in a statute, none other will be implied.[82] The court in *Crechale & Polles, Inc. v. Smith*,[83] recognizing that a landlord had both a remedy at law to evict the holdover tenant and also a remedy in chancery for specific performance of the renewed contract, indicated the continued viability of the common-law remedy.[84]

In the instant case, the Mississippi Supreme Court settled once and for all that the lease renewal may not be effectuated under the common-law rule and that the statutory penalty is the exclusive mea-

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[79] *Id.*; *see also* Viator v. Moses, 186 Miss. 419, 420, 191 So. 412, 412 (1939)(by holding over with consent of landlord, tenant became tenant from year to year); Richardson v. Neblett, 122 Miss. 723, 741, 84 So. 695, 697 (1920)(same); Love v. Law, 57 Miss. 596, 598 (1880)(tenancy from year to year); Usher v. Moss, 50 Miss. 208, 211 (1874)(where landlord made no objection to holding over, tenancy from year to year was created that landlord could not terminate until end of year). *See generally* 3 G. THOMPSON, REAL PROPERTY §§ 1023-24 (conversion of tenancy at sufferance into tenancy at will, month to month or year to year); White v. Mississippi Power & Light Co., 196 So. 2d 343, 349 (Miss. 1967)(definition of tenancy at sufferance).

The *Tonkel* Court declared it to be the duty of the lessee to procure a new lease or surrender the property at the expiration. The court stated that it was immaterial that the lessee intended only to remain a short period of time if the lessor did not consent to the different terms or effecutate consent by allowing possession pending negotiations. *Tonkel*, 163 Miss. at 216, 141 So. at 344-45. In *Tonkel* the tenant informed the agent of the landlord that he would lease only from month to month if there was no rent reduction. The agent having made no commitment, the lease expired without a new contract being entered. The court found there to be insufficient negotiations to constitute consent by the landlord to the different terms. *Id.*

[80] 178 Miss. 659, 174 So. 556 (1937).

[81] *Id.* at 664, 174 So. at 556. In *Tepper Brothers* the landlord filed in mayor's court for dispossession and statutory double rent against a holdover tenant and in circuit court for actual and punitive damages. The Mississippi Supreme Court determined that double rent was the sole measure of damages. *Id.*

[82] *Id.*; *see also* State *ex rel.* Greaves v. Henry, 87 Miss. 125, 143, 40 So. 152, 153-54 (1906)(construction of constitutional provisions).

[83] 295 So. 2d 275 (Miss. 1974).

[84] *Id.* at 278-79. The court stated that while specific performance was an available remedy, enforcement of the lease was within the sound discretion of the chancellor. *Id.* The Mississippi Supreme Court found the landlord not to be entitled to specific performance because he had previously declared the tenants to be trespassers and could not now change his election and treat them as tenants under a renewed lease. A tenancy from month to month was created. *Id.* at 277.

sure of money damages for a holdover tenancy.[85] The court hastened to add that the landlord may also evict the holdover tenant, under section 89-7-25 of the Mississippi Code.[86] The court determined, however, that Howie was not entitled to receive the statutory damages[87] because, having elected to treat the department as a trespasser in demanding surrender, he failed to pursue eviction and action for double rent.[88] This failure, the court held, created a month-to-month tenancy when Howie accepted the July rent, and entitled him to nothing further.[89]

As a result of *Howie*, the landlord must be extremely cautious in dealing with a holdover tenant. The landlord, by rightfully demanding surrender but subsequently accepting payment,[90] will not be exercising an option to renew the lease[91] but may instead be creating a month-to-month tenancy,[92] thus waiving his statutory penalty.[93]

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[85] 449 So. 2d at 778.

[86] *Id.* at 778 n.1. Pursuant to § 89-7-27, a holdover tenant may be removed from the premises by a judge of the county or justice court of the county where the land is situated, or by the mayor or police justice of any town or city where the land is situated. MISS. CODE ANN. § 89-7-27 (1972).

The Mississippi Supreme Court has held that recovery of the statutory double rent is not restricted to actions of eviction. *See* Burr v. Johnson, 204 Miss. 479, 485, 37 So. 2d 747, 747 (1949)(unlawful entry and detainer); Ellison v. Landry, 191 Miss. 161, 162, 24 So. 2d 319, 319 (1946)(relying on statutory language that penalty may be collected "as a single rent"); Weatherall v. Brown, 113 Miss. 887, 894, 74 So. 765, 765 (1917)(attachment).

[87] *Howie*, 449 So. 2d at 778-79.

[88] *Id.*; *see supra* notes 66-72 and accompanying text (facts).

[89] *Howie*, 449 So. 2d at 778. The court relied on *Crechale*, 449 So. 2d at 778. *See supra* notes 83-84 and accompanying text (month-to-month tenancy in *Crechale*). In *Crechale* the court still recognized the common-law remedy; therefore, the chancellor in his discretion could have awarded specific performance. *See supra* note 84 (specific performance). In *Howie*, since the common-law remedy is no longer available, there is no possibility that the landlord's acceptance of money will extend the lease. His actions will create some other form of tenancy, apparently waiving the right to demand the statutory penalty. *See Howie*, 449 So. 2d at 778 (entitled to no further remedy).

This apparent waiver of double rent is in conflict with earlier decisions of the court that the liability is absolute. *See* Stovall v. Gardner, 203 Miss. 527, 532, 36 So. 2d 163, 165 (1948)(liability absolute; accrues by statute not contract); Weatherall v. Brown, 113 Miss. 887, 894, 74 So. 765, 766 (1917)(liability absolute without reference to tenant's good faith).

[90] *See supra* notes 67 and 71 and accompanying text (factual circumstances in *Howie*).

[91] *See supra* note 85 and accompanying text (common-law remedy abrogated by statute).

[92] *See supra* note 89 and accompanying text (month-to-month tenancy created).

[93] *See supra* note 89 and accompanying text (no entitlement to statutory penalty).

III. LEGISLATION

In 1984 the Mississippi legislature enacted legislation dealing with liens,[94] partitions,[95] taxation,[96] eminent domain,[97] security interests in crops,[98] state park lands,[99] sixteenth-section lands,[100] airport properties,[101] unlawful entry onto property of another,[102] unlawful holding-over on hotel property,[103] and oil and gas.[104]

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[94] Act of April 10, 1984, ch. 319, 1984 Miss. Laws 37 (codified at MISS. CODE ANN. § 85-7-197 (Supp. 1984))(amending MISS. CODE ANN. § 85-7-197 (1972))(providing that laborer, materialman, or architect may give notice of lien to landowner in person or by certified mail).

[95] Act of April 26, 1984, ch. 437, 1984 Miss. Laws 223 (codified at MISS. CODE ANN. §§ 11-21-11 to -27 (Supp. 1984))(amending MISS. CODE ANN. §§ 11-21-11 to -27 (1972))(authorizing court-ordered appraisal of property subject to court-ordered partition by sale).

[96] Act of May 9, 1984, ch. 456, 1984 Miss. Laws 307 (codified at MISS. CODE ANN. § 21-33-55 (Supp. 1984))(amending MISS. CODE ANN. § 21-33-55 (1972))(exempting leasehold interests in real or personal property belonging to state or any political subdivision which escaped past assessment of ad valorem taxation); Act of April 30, 1984, ch. 451, 1984 Miss. Laws 270 (codified at MISS. CODE ANN. § 27-25-703 (Supp. 1984))(amending MISS. CODE ANN. § 27-25-703 (1972))(exempting pipelines, dehydraters, and compressors used to facilitate transportation of carbon dioxide to enhance oil recovery in Mississippi projects from ad valorem taxation).

[97] Act of April 23, 1984, ch. 420, 1984 Miss. Laws 183 (codified at MISS. CODE ANN. § 11-27-47 (Supp. 1984))(amending MISS. CODE ANN. § 11-27-47 (1972))(empowering entities conveying, distributing or transporting carbon dioxide for use in enhancing recovery of liquid or gaseous hydrocarbon with the right of eminent domain to build or construct pipelines for distribution of carbon dioxide).

[98] Act of May 9, 1984, ch. 454, 1984 Miss. Laws 305 (codified at MISS. CODE ANN. § 75-9-401 (Supp. 1984))(amending MISS. CODE ANN. § 75-9-401 (1972))(clarifying proper place to file finance statement to perfect security interest in growing crops).

[99] Act of May 15, 1984, ch. 494, 1984 Miss. Laws 638 (codified at MISS. CODE ANN. § 55-3-47 (Supp. 1984))(amending MISS. CODE ANN. § 55-3-47)(empowering Mississippi Commission on Natural Resources to lease, convey, or grant easements across state parklands and settle boundary or title disputes to certain state park lands).

[100] Act of April 10, 1984, ch. 322, 1984 Miss. Laws 38 (codified at MISS. CODE ANN. § 29-3-69 (Supp. 1984))(amending MISS. CODE ANN. § 29-3-69 (1972))(authorizing lease of sixteenth-section lands by board of education to any church having its principal place of worship on such lands for at least 25 years, for lease term not to exceed 99 years).

[101] Act of April 16, 1984, ch. 370, 1984 Miss. Laws 106 (codified at MISS. CODE ANN. § 61-3-19 (Supp. 1984))(amending MISS. CODE ANN. § 61-3-19 (1972))(establishing new method of sale, lease, or disposal of properties of certain airport authorities).

[102] Act of May 15, 1984, ch. 504, 1984 Miss. Laws 701 (codified at MISS. CODE ANN. § 97-17-93 (Supp. 1984))(amending MISS. CODE ANN. § 97-17-93 (1972))(making it misdemeanor to knowingly enter lands of another without permission or accompaniment of landowner, lessee or agent; penalties).

[103] Act of April 26, 1984, ch. 434, 1984 Miss. Laws 220 (codified at MISS. CODE ANN. §§ 75-73-9 to -13 (Supp. 1984))(amending MISS. CODE ANN. §§ 75-73-9 to -13

Of particular interest is the Mississippi legislature's amendment of the state's oil and gas pooling statute[105] to impose a risk penalty[106] on nonconsenting owners[107] who elect not to participate in the costs of drilling and equipping oil and gas wells.[108] The statute provides that when two or more separately-owned tracts of land are embraced within an established drilling unit or when a unit consists of separately-owned interests and the parties owning an interest in the unit do not agree to integrate their interests to develop the unit, the oil and gas board may require that the interests be integrated on just and reasonable terms.[109]

(1972))(making it misdemeanor to remain in hotel/motel room past acknowledged departure time provided certain procedures are met; penalties; authorizing ejectment of holdover guest by use of assistance of appropriate lawful authority).

[104] Act of April 18, 1984, ch. 380, 1984 Miss. Laws 125 (codified at MISS. CODE ANN. §§ 53-1-39, 53-3-119 (Supp. 1984))(amending MISS. CODE ANN. §§ 53-1-39, 53-3-119 (1972))(providing that appeals to circuit court from rules, regulations, or orders of oil and gas board be perfected within 30 days from date such rule, regulation, or order is actually filed for record in office of board).

[105] Act of May 14, 1984, ch. 511, 1984 Miss. Laws 736 (codified at MISS. CODE ANN. § 53-3-7 (Supp. 1984))(amending MISS. CODE ANN. § 53-3-7 (1972))(substantive provisions of the act hereinafter cited as MISS. CODE ANN. § 53-3-7 (Supp. 1984)).

[106] *See* MISS. CODE ANN. § 53-3-7 (Supp.1984)(provides that under certain conditions, all owners participate in certain risks for drilling or completing unit well, or, in the alternative, that consenting owners own production attributable to nonconsenting owners until certain costs are recovered). The "risk penalty," "risk compensation," or "risk bonus" relieves the nondrilling interest owner from the necessity of advancing his proportionate share of drilling expenses while providing the party who advances the entire costs extra compensation from production if production is obtained. The consenting owners will absorb the entire cost if the well is completed as a dry hole. *In re* Kohlman, 263 N.W. 2d 674, 675 (S.D. 1978); *see infra* note 122 and accompanying text (penalty taken only out of production). *See generally* 5 W. SUMMERS, THE LAW OF OIL AND GAS § 974 (1966)(unattractiveness of statutes requiring drilling party carry non-drilling interest at his own risk). Statutes imposing risk compensation prevent the nondrilling interest from taking a "free ride." *See Kohlman*, 263 N.W. 2d at 676 (statutes preventing "free ride").

[107] *See* MISS. CODE ANN. § 53-3-7 (1)(c)(Supp. 1984)(nonconsenting owner is owner of drilling rights who has not agreed in writing to integrate unit). An owner of drilling rights in the unit may consent to integrate as to some of his rights and be nonconsenting as to others. *Id.*

[108] *See* MISS. CODE ANN. § 53-3-7(1)(a)(risk penalty).

[109] *Id.* § 53-3-7(1)(a). This portion of the statute was unchanged by the amendment. *Compare id.* (integration of interests by board) *with* MISS. CODE ANN. § 53-3-7(a)(1972)(same). The board is empowered to integrate interests to prevent waste or avoid the drilling of unnecessary wells. MISS. CODE ANN. § 53-3-7(1)(a)(Supp. 1984). It is the declared public policy of Mississippi to encourage the development of the state's natural resources, prevent their waste, protect the co-equal and correlative rights of owners in the common source of supply, and to obtain the full development of the resources as soon as practicable by progressive drilling. MISS. CODE ANN. § 53-1-1 (1972); *see also id.* § 53-1-3(k)(definition of "waste").

The amendment establishes that in lieu of the actual expenditures incurred in developing and operating the pooled unit chargeable to other interest owners,[110] the operator may elect to recover alternate charges[111] provided that he satisfies certain procedural requirements.[112]

First, before an operator[113] may petition the board for alternate charges, he must make a good faith effort to negotiate for voluntary integration with each nonconsenting owner and offer him the opportunity to lease, farm-out, or participate on reasonable terms.[114] Second, in his petition, the operator must state the names and addresses of all nonconsenting owners[115] and furnish a notice of hearing to each nonconsenting owner.[116] Third, if the pooling order is issued and the non-

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[110] *See* MISS. CODE ANN. § 53-3-7(1)(b)(Supp. 1985). The subsection provides that in the event of pooling, the cost of development and operation chargeable to other interest owners is limited to actual expenditures and supervision charges, not in excess of what is reasonable. *Id.* In the predecessor statute, this provision for cost was the only one available to the operator. *See* MISS. CODE ANN. § 53-3-7 (a)(1972)(actual expenditures). The amendment, however, provides for an election of alternate charges. *See* MISS. CODE ANN. § 53-3-7 (2)(g)(Supp. 1984)(alternate charges); *see also infra* notes 119-21 and accompanying text (discussion of (2)(g)).

Many states retain actual and reasonable expenditures as the measure of cost of unit development and operation chargeable to other interest owners. *See e.g.*, ALA. CODE § 9-17-13 (1980)(actual expenditures not in excess of what are reasonable); ALASKA STAT. § 31.05.100 (1962)(same); ARIZ. REV. STAT. ANN. § 27-505 (1956)(same); IND. CODE ANN. § 13-4-7-14 (Burns 1981)(same); IOWA CODE ANN. § 84.8 (West Supp. 1984)(same); MO. ANN. STAT. § 259.110 (Vernon 1959 & Supp. 1984)(same); MONT. CODE ANN. § 82-11-202 (1983)(same); NEV. REV. STAT. § 522.060 (1983)(same); N.D. CENT. CODE § 38-08-08 (1979 & Supp. 1983)(same); *see also infra* note 122 (discussion of Oklahoma statute).

[111] *See* MISS. CODE ANN. § 53-3-7(2)(g)(Supp. 1984)(alternate charges). In no event will the operator be entitled to recover less under (2)(g) than he would under (1)(b). *Id.* § 53-3-7(2)(g).

[112] *See infra* notes 113-19 and accompanying text (procedural requisites to alternate charges).

[113] *See* MISS. CODE ANN. § 53-3-7(2)(a)(Supp. 1984)(prerequisites to petition for alternate charges). The operator must be an operator of a drilling unit in which the majority of drilling interestss have voluntarily consented to the integration. *Id.*

[114] *Id.* In the process of these negotiations, the operator must determine the address of each nonconsenting owner, notify him of the names of all owners consenting to the integration, and give the nonconsenting owners written notice of the specific proposals for unit operation. *Id.*

[115] *Id.* § 53-3-7(2)(b). The names shall be ascertained as of a date not more than 90 days prior to the filing of the petition, which shall include the addresses, if known, or, if unknown, a statement of diligent search and inquiry. *Id.*

[116] *Id.* § 53-3-7(2)(c), (e). The notice will be published as to the nonconsenting owners of unknown address and mailed by registered mail to each nonconsenting owner of known address. *Id.* In giving the notice both to the consenting and nonconsenting owners, the form provided in subsection (c) is to be substantially followed. *Id.* The costs of publication and mailing of notices are to be determined by the board and assessed as a

consenting owner does not thereafter agree to integration,[117] the operator must commence drilling within 180 days after issuance of the order and thereafter use due diligence to drill, test and complete, through the well head, a well with the capacity to yield a return that exceeds monthly operating costs.[118]

When these requirements are met, the operator may be entitled to receive as an alternative to actual reasonable expenditures a sum equal to[119] (1) 100% of the nonconsenting owner's share[120] of the cost of newly acquired surface equipment beyond the well head connections; (2) 250% of the nonconsenting owner's share of costs of newly acquired equipment in the well; (3) 250% of the nonconsenting owner's share of the costs and expenses of drilling, reworking, deepening, plugging back, testing and completing the well; and (4) 100% of the nonconsenting owner's share of the costs of well operation, beginning with first production.[121] These charges are payable by the nonconsenting

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cost of operation subject to (2)(g) alternate charges. *Id.* § 53-3-7(2)(f). For required dates of publication see *id.* § 53-3-7 (2)(d).

[117] *Id.* § 53-3-7(2)(g). The order must provide an opportunity for each nonconsenting owner to participate in the development and operation of the unit well on the same cost basis as the consenting owners. The nonconsenting owner may agree in writing to pay his share of the costs or enter into another written agreement with the operator. *Id.*

[118] *Id.; see also infra* note 122 and accompanying text (costs recoverable only out of production).

[119] MISS. CODE ANN. § 53-3-7(2)(g)(Supp. 1984); *see supra* note 110 and accompanying text (provision for actual reasonable expenditures). If the operator has filed for alternative charges on two drilling units that are direct, partially direct, or diagonal offsets of each other, he may not petition for alternate charges as to the additional units which are offsets to the first two units until the first two have been drilled, tested, and completed and a report filed, or until the well permit on one or both have expired with the wells not having been drilled. MISS. CODE ANN. § 53-3-7(2)(g)(Supp. 1984).

[120] MISS. CODE ANN. § 53-3-7(2)(g)(Supp. 1984). The alternate charges are levied only on the nonconsenting owner's nonconsenting interests. *Id.; see supra* note 107 (nonconsenting owner may also have rights to which he consents to integration).

[121] MISS. CODE ANN. § 53-3-7(2)(a)(Supp. 1984). The well must be drilled on a competitive, arms-length contract. *Id.* If a dispute arises as to relative costs, the board will determine proper costs after giving notice to the parties and holding a hearing on the dispute. *Id.* § 53-3-7 (4). *Compare id.* (board to determine disputed costs) *with* OKLA. STAT. ANN. tit. 52, § 87.1 (West Supp. 1984)(corporation commission to determine disputed costs). In W.L. Kirkman, Inc. v. Oklahoma Corp. Comm'n, 676 P. 2d 283 (Okla. Ct. App. 1983), the Oklahoma Court of Appeals held that an evaluation of proper costs required the commission to determine, first, whether the actual expenditure had to be made and, second, whether the expenditure had been reasonable. *Id.* at 287. The court remanded the case to the corporation commission for a complete determination of the reasonableness of the costs and business decisions by the operator. Thus, the court refused to allow automatic approval of every invoice submitted by the operator. *Id.* at 287-88.

The statutory scheme adopted by the Mississippi legislature is similar to express maximum risk penalty statutes enacted in several other states. *Compare* MISS. CODE ANN. § 53-3-7 (Supp. 1984)(risk penalty) *with* COLO. REV. STAT. § 34-60-116 (1984)(100% of nonconsenting owner's share of surface equipment beyond well head; 100% of nonconsenting owner's share of costs of operation beginning with first production; 200% of expenses of site preparation, drilling; 200% of cost of equipment in the well) *and* ILL. ANN. STAT. ch. 96 ½, § 5436 (Smith-Hurd 1979)(100% of nonconsenting owner's share of costs of surface equipment; 100% of nonconsenting owner's share of costs of operation beginning with first production; 150% of nonconsenting owner's share of actual costs of drilling, testing, completing well) *and* LA. REV. STAT. ANN. § 30:10 (West Supp. 1985)(allocated share of actual reasonable expenses incurred in drilling, completing, equipping, and operating well plus risk charge of 100% of allocated share of drilling, testing and completing well) *and* NEB. REV. STAT. § 57-909 (1984)(200% of nonconsenting owner's share of costs of site preparation, drilling, and completing well; 100% of nonconsenting owner's equipment; 100% of nonconsenting owner's share of costs of operation) *and* N.M. STAT. ANN. § 70-2-17 (1984)(actual reasonable expenditures that may include risk charge not to exceed 200% of nonconsenting owner's share of costs of drilling and completing well) *and* N.Y. ENVTL. CONSERV. LAW § 23-0901 (McKinney 1984)(twice share of reasonable actual costs of drilling, equipping and operating well) *and* OHIO REV. CODE ANN. § 1509.27 (Page 1978)(not to exceed double share of costs charged to nonconsenting owner) *and* PA. STAT. ANN. tit. 58, § 408 (Purdon 1964)(double share of cost charged to nonconsenting owner for cost of drilling and operating well) *and* TEX. NAT. RES. CODE ANN. § 102.052 (Vernon 1978)(all actual reasonable drilling, completion, and operation costs plus risk charge not to exceed 100% of drilling completion costs) *and* UTAH CODE ANN. § 40-6-6 (Supp. 1983)(100% of nonconsenting owner's share of costs of surface equipment beyond well head connections; 100% of nonconsenting owner's share of operating well, starting with first production; amount to be determined by board not less than 150% nor more than 200% of costs of preparing site, drilling, testing, and completing well; cost of equipment in well) *and* WASH. REV. CODE ANN. § 78.52.250 (Supp. 1985)(100% of nonconsenting owner's share of surface equipment beyond well head; 100% of nonconsenting owner's share of costs of operation, beginning with first production; 150% of nonconsenting owner's share of costs of well site preparation, drilling, testing, and completing well; 150% of nonconsenting owner's share of cost of equipment in the well) *and* WYO. STAT. § 30-5-109 (1977)(100% of nonconsenting owner's share of newly acquired surface equipment beyond well head; 100% of nonconsenting owner's share of operation, beginning with first production; 200% of nonconsenting owner's share of costs of drilling, testing, completing well; 200% of nonconsenting owner's share of costs of newly acquired equipment in well). *See generally* 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 905.2 (1984)(exemplary compulsory pooling statutes).

In contrast to these explicit statutory provisions providing maximum reimbursement for costs of the unit well, the Oklahoma pooling statute retains general language for "actual expenditures . . . not in excess of what are reasonable. . . ." *See* OKLA STAT. ANN. tit. 52, § 87.1 (West Supp. 1984)(compulsory pooling statute). In Anderson v. Corporation Comm'n, 327 P.2d 699 (Okla. 1957), the Oklahoma Supreme Court construed the broad statutory language as authorizing the corporation commission to require the nondrilling interest to elect between participating in the working interest of the well or accepting a stated per acre bonus for the lease of his individual interest. *See id.* at 701-02 (upholding forced lease).

One last type of statutory reimbursement scheme provides that on request, the state

owner only out of production.[122] On request of the nonconsenting owner, the operator must furnish an inventory of all equipment and an itemized statement of costs incurred.[123] Further, should the nonconsenting owner's interest be a leasehold interest, the operator or purchaser of production shall pay the nonconsenting owner's lessor his contracted royalty.[124]

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agency shall provide equitable alternatives for the nonparticipant. *See e.g.*, ARK. STAT. ANN. § 53-115 (1971)(transfer of rights to participants on permanent or limited basis); KY. REV. STAT. ANN. § 353.640 (Baldwin 1984)(surrender of interest on reasonable basis or participation on limited or carried basis on just and reasonable terms); IDAHO CODE § 47-322 (1977)(same); MICH. COMP. LAWS ANN. § 319.356 (West 1984)(provision for carrying nonparticipant); S.D. CODIFIED LAWS § 45-9-33 (1983)(surrender of leasehold on just basis or participation on just, reasonable carried basis); W. VA. CODE § 22-4A-7 (1981)(surrender of interest to participants on reasonable basis or participation on limited or carried basis on just, reasonable terms whereupon double share of nonparticipant's costs recovered). In *In Re* Kohlman, 263 N.W.2d 674 (S.D. 1978) the South Dakota Supreme Court found that the term "limited or carried basis" obviously meant something more than "a pro rata sharing of the well cost." *Id.* at 678. The court recognized that the drilling party carried the nonparticipating owner in exchange for risk compensation. The court then held that the Board of Natural Resource Development could set risk compensation in order to carry out its duty of imposing a compulsory pooling order when the alternative of a carried basis provided. *Id.* at 678-79. The court upheld a 100% risk penalty as reasonable under the circumstances. *Id.* at 679.

[122] MISS. CODE ANN. § 53-3-7(3)(Supp. 1984). If production resulting from integration does not secure paying quantities, the nonconsenting owner is chargeable with no costs. *Id.* If there is production in paying quantities, the operator is entitled to receive the nonconsenting owner's share of production until the alternate charges are recovered. *Id.* § 53-3-7(2)(h). When these costs have been recovered, the nonconsenter becomes owner of an interest in the well, material, equipment, and production, as if he had originally consented. *Id.*

[123] *Id.* § 53-3-7(2)(h). The operator may submit a detailed monthly statement of costs in lieu of an itemized statement of costs of operation. Further, should the nonconsenting owner so request, the operator must furnish an itemized statement of all costs, liabilities, and production of the well operation in the preceding month. Any amount realized from the disposition of equipment attributable to the nonconsenting owner's share must be credited against the total unreturned costs attributable to that owner. *Id.*

[124] *Id.* § 53-3-7(2)(h), (i). For this obligation to arise, there must be no reasonable question as to the marketable title of the royalty interest. The operator is not liable for a royalty in excess of a 3/16 proportionate share of production. The operator's obligation does not affect the nonconsenting owner's responsibility for royalty payment not so paid. *Id.*

Several other states also provide that royalty payments attributable to the nonconsenting owner's share are payable out of production. *See e.g.*, ILL. ANN. STAT. ch. 96 ½, § 5436 (Smith-Hurd 1979)(consenting owner entitled to nonconsenter's share of production exclusive of royalty not to exceed ⅛); KY. REV. STAT. ANN. § 353.650 (Baldwin 1984)(same); WASH. REV. CODE ANN. § 78.52.250 (West Supp. 1984)(exclusive of lease royalty); WYO. STAT. § 30-5-109 (g)(Supp. 1983)(same).

Some statutes go even further to provide a cost-free interest if the nonconsenter's

Compulsory pooling statutes are generally upheld as valid exercises of states' police powers.[125] The question, then, arising from Mississippi's amended statutory scheme will not be whether the scheme is valid, but whether the election of alternate charges[126] when weighed against the extensive procedural requisites[127] will justify the election in the valid business interests of the operator.[128]

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interest is not leased. *See e.g.*, COLO. REV. STAT. § 34-60-116 (1984)(consenting owners entitled to nonconsenter's share exclusive of royalty; unleased interest deemed to have 12 ½% royalty); NEB. REV. STAT. § 57-909 (1984)(same); N.M. STAT. ANN. § 70-2-17 (1984)(lease royalties payable out of production); N.Y. ENVTL. CONSERV. LAWS § 23-0901 (McKinney 1984)(royalty not to exceed ⅛ of production); OHIO REV. CODE ANN. § 1509.27 (Page 1978)(if leased, exclusive of royalty; otherwise, ⅛ of nonconsenting owner's share of production); OKLA. STAT. ANN. tit. 52 § 87.1 (West Supp. 1984)(nonconsenting owner deemed to have ⅞ interest as lessee and ⅛ interest as lessor); PA. STAT. ANN tit. 58, § 408 (Purdon 1964)(exclusive of ⅛ share of production); UTAH CODE ANN § 40-6-6 (Supp. 1983)(exclusive of royalty; unleased interest also to receive average landowner's royalty attributable to tract); W. VA. CODE § 22-4A-7 (1981)(exclusive of royalty in lease or if no lease, of ⅛ of production attributable to unleased tracts).

[125] *See e.g.*, Superior Oil Co. v. Foote, 214 Miss. 857, 875, 884, 59 So. 2d 85, 93, 97 (1952)(using police power to promote development of industry and utilization of natural resources to enhance prosperity of state; upheld power to forcibly pool); Anderson v. Corporation Comm'n, 327 P.2d 699, 701-04 (Okla. 1957)(statute regulating production of oil valid exercise of state police power).

[126] *See supra* notes 110-11, 119-21, and accompanying text (discussion of alternate charges).

[127] *See supra* notes 113-18, 123, and accompanying text (discussion of requisites to alternate charges).

[128] *See supra* notes 110-11 and accompanying text (operator's option to seek alternate charges).

TORTS

In 1984 the Mississippi Supreme Court decided a number of tort cases, two of which have been chosen for commentary. Those not selected for commentary dealt with negligence,[1] damages,[2] dental mal-

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[1] Monroe County Elec. Power Ass'n v. Pace, 461 So. 2d 739, 748 (Miss. 1984)(where contractor turned work over to owner "in . . . manner so negligently defective as to be imminently dangerous to third persons," contractor may be liable to injured third persons despite owner's acceptance of work); Stubblefield v. Jesco, Inc., 458 So. 2d 699, 705-07, *withdrawn from publication pending reh'g*, 458 So. 2d (Miss. 1984)(expert testimony could properly be accepted by jury even though it amounted to stacking inference upon inference, provided each inference was reasonable); Stong v. Freeman Truck Line, Inc., 456 So. 2d 698, 704, 712-13 (Miss. 1984)(in motor vehicle accident case, limited access interstate highway is not within business or residence district under either Uniform Highway Traffic Regulation Law or Federal Highway Administration regulations; MISS. CODE ANN. §§ 63-11-7, -43 (1972) proscribe receipt into evidence of blood alcohol test performed upon deceased person); Goodwin v. Gulf Transp. Co., 453 So. 2d 1035, 1036-37 (Miss. 1984)(general rules applicable in slip-and-fall cases apply to claims against bus companies and mere fact that passenger slipped on some substance on bus floor does not give rise to presumption of negligence on part of bus company); Jesco, Inc. v. Whitehead, 451 So. 2d 706, 709-10 (Miss. 1984)(evidence of violation of city ordinance justified refusal of defendant's instruction requiring jury to base its decision on testimony of plaintiff's expert witness; it is error for attorney to tell jury that his client will not receive jury's award until worker's compensation benefits are repaid; instruction as to recovery for loss of future earnings must require jury to discount loss to its present value); Jesco, Inc. v. Shannon, 451 So. 2d 694, 700, 702-03 (Miss. 1984)(expert witness is not required to testify with absolute certainty; video tape depicting normal burn treatment procedures was admissible; earning capacity may be substantially impaired despite fact that defendant rehired plaintiff at pre-injury wage); Barkley v. Miller Transporters, Inc., 450 So. 2d 416, 418 (Miss. 1984)(plaintiff may rely upon direct evidence and reasonable inference therefrom to show that defendant's negligence proximately caused plaintiff's injury); Howard v. Young, 450 So. 2d 90, 91 (Miss. 1984)(judgment notwithstanding mistrial in favor of defendant motorist was improper where evidence could support reasonable inference that defendant was speeding and failed to keep proper lookout); Litton Systems, Inc. v. Enochs, 449 So. 2d 1213, 1216 (Miss. 1984)(where evidence failed to show that pedestrian route taken by business invitee was not maintained by defendant, refusal to grant defendant's requested assumption of risk instruction was proper).

[2] City of Jackson v. Ainsworth, 462 So. 2d 325, 329 (Miss. 1984)(in personal injury action, trial court did not abuse its discretion in ordering additur where plaintiff presented uncontradicted credible evidence of pain and suffering and jury clearly failed to include such elements in its award of damages); Jackson v. Brumfield, 458 So. 2d 736, 739 (Miss. 1984)(where plaintiff underwent extensive surgery, was unable to work for six months, lost wages of $7,000 and medical expenses of $8,000, and would be relatively unable to perform socially or professionally, jury verdict of $20,000 was so inadequate as to evince bias, passion or prejudice; itemized medical bills are prima facie evidence that

practice,[3] medical malpractice,[4] sovereign immunity,[5] qualified immunity of public officials,[6] riparian rights,[7] statutes of limitations,[8] trespass,[9] bad faith,[10] owners and occupiers of land,[11] employer respon-

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bills so paid or incurred were necessary and reasonable); Merritt v. Dueitt, 455 So. 2d 792, 793 (Miss. 1984)(where certainty exists as to damage, uncertainty as to extent of damage does not prevent recovery); Hynum v. Smith, 447 So. 2d 1288, 1290 (Miss. 1984)(where trial court gave contributory negligence instruction and evidence conflicted as to how accident occurred, jury award of $35,000 to plaintiff who was pinned in automobile wreckage and suffered shattered kneecap, broken jaw, broken nose, severe facial lacerations and death of her five and one-half month old fetus was not so paltry as to evidence bias, passion or prejudice).

[3] Pittman v. Hodges, 462 So. 2d 330, 333, 335 (Miss. 1984)(for purposes of Mississippi's two year statute of limitations, where dentist in last consultation with patient incorrectly diagnosed permanent condition as temporary, earliest date at which patient reasonably could have discovered permanent condition was no sooner than earliest date given by dentist for "temporary" condition to subside; medical expert's testimony that three possible breaches of standard of care could have caused plaintiff's condition satisfied requirement that medical expert testify in terms of medical probabilities rather than possibilities).

[4] Reikes v. Martin, No. 53,915, slip op. at 12 (Miss. Jan. 25, 1984)(to recover under doctrine of informed consent in medical malpractice action, plaintiff must satisfy objective, rather than subjective, standard by showing that reasonably prudent patient, fully informed of known material risks, would not have consented to treatment), *original opinion withdrawn*, 471 So. 2d 385 (Miss. 1985); *see also* MISS. CODE ANN. § 41-41-3 (Supp. 1984)(establishing classes of persons who may consent to surgical or medical treatment or procedures).

[5] McGolderick Oil Co. v. Greene County, 446 So. 2d 594, 595 (Miss. 1984)(abolition of doctrine of sovereign immunity applies only to causes of action accruing on or after July 1, 1984); *see also* Act of May 15, 1984, ch. 495, 1984 Miss. Laws §§ 2, 3 (legislative response to judicial abrogation of sovereign immunity).

[6] Hudson v. Rausa, 462 So. 2d 689, 695-96 (Miss. 1984)(medical malpractice committed while administering overall program of communicable disease control was discretionary function entitling state-employed doctor and nurses to qualified public official immunity).

[7] Georgia Pacific Corp. v. Armstrong, 451 So. 2d 201, 205-06 (Miss. 1984)(upper riparian land owner whose property is flooded by actions of lower riparian landowner is entitled to redress in form of damages, temporary or permanent, injunction, mandatory or prohibitory, or other appropriate equitable relief; in determining damages, both market data and income approaches as well as plaintiff's mitigation of damages should be considered).

[8] West End Corp. v. Royals, 450 So. 2d 420, 424 (Miss. 1984)(ten-year limitation provided in MISS. CODE ANN. § 15-1-41 (Supp. 1984) held inapplicable where builder was also owner of property in question).

[9] Seismic Petroleum Serv. v. Ryan, 450 So. 2d 437, 440-41 (Miss. 1984)(compensatory, statutory and punitive damages are allowable in trespass action).

[10] Blue Cross & Blue Shield v. Campbell, 466 So. 2d 833, 841-44 (Miss. 1984)(in punitive damages case, trial judge must first decide if facts justify issuing punitive damages instruction to jury; if trial judge finds insurer had "reasonably arguable basis" for

sibility for damage judgment,[12] and insurance adjuster liability to the insured.[13]

I. Plaintiff's Status in Mississippi Defamation Law

In *Ferguson v. Watkins*,[14] the Mississippi Supreme Court extended the scope of the public figure doctrine in Mississippi defamation law.[15] Relying upon United States Supreme Court precedent[16] and

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denying claim, bad faith instruction is improper; normally if directed verdict on contract claim is not granted in favor of insured, punitive damages instruction will be improper, but this rule is not absolute).

[11] Diamond Int'l Corp. v. May, 445 So. 2d 832, 835 (Miss. 1984)(property owner is liable to business invitee only for latent defects known to owner but unknown to business invitee and is not liable for readily perceived defects in premises or machinery thereon).

[12] Thomas v. Deviney Constr. Co., 458 So. 2d 694, 698 (Miss. 1984)(in motor vehicle accident case, regardless of relationship between employer and insurance company, employer is responsible under Mississippi Motor Vehicle Safety Responsibility Act, Miss. Code Ann. § 63-15-1 (1972), for judgment of damages caused by driver who used vehicle with permission of employer's foreman).

[13] Southside, Inc. v. Clark, 460 So. 2d 113, 114-15 (Miss. 1984)(declaration alleging that defendant took order for insurance, that plaintiff relied on this order in refraining from obtaining insurance elsewhere, that defendant negligently failed to obtain insurance causing damage to plaintiff, stated a cause of action).

[14] 448 So. 2d 271 (Miss. 1984).

[15] *Id.* at 279; *see infra* note 33.

[16] *Ferguson*, 448 So. 2d at 277; *see* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)(public official could not recover damages for defamatory statements concerning official conduct absent proof of "actual malice" on part of defendant; "actual malice" defined as knowledge of falsity or reckless disregard for truth); Henry v. Collins, 380 U.S. 356, 357-58 (1965)(*New York Times* "actual malice" distinguished from common-law malice denoting ill will or spite).

In *New York Times*, Justice Brennan, writing for the Court, asserted that a law which permits criticism of official conduct to contain only true statements would limit public discourse and chill potential criticism of the government. *New York Times*, 376 U.S. at 279. The Court reasoned that the national commitment to free speech and debate demanded that freedom of expression be accorded due "breathing space." *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). Therefore, a public official seeking to recover in a defamation action must prove "actual malice," defined as knowledge of falsity or reckless disregard for whether the statement was true or false. *New York Times*, 376 U.S. at 279-80. For a more detailed discussion of *New York Times*, see Pierce, *The Anatomy of an Historic Decision:* New York Times Co. v. Sullivan, 43 N.C.L. Rev. 315 (1964).

Three years later in the companion cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967), the United States Supreme Court extended the *New York Times* standard to "public figures." *Butts*, 388 U.S. at 155. Writing for the Court, Justice Harlan asserted that public interest in public figures was as great as public interest in public officials; therefore, the *New York Times* standard should also apply

a broad definition of "public figure,"[17] the state supreme court held that any person who becomes voluntarily or involuntarily involved in a matter of legitimate public interest is a "vortex public figure"[18] who

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to public figures. *Butts*, 388 U.S. at 154-55. In *Butts*, the Court disagreed on the grounds of the decision while agreeing on the result; five justices wrote separate opinions. *Id.* at 133.

The Court extended *New York Times* to its outermost limits in Rosenbloom v. Metromedia, 403 U.S. 29 (1971). In *Rosenbloom*, the plaintiff was required to prove actual malice even though he was neither a public figure nor a public official. *Id.* at 43-44. Justice Brennan, writing for the plurality, concluded that the *New York Times* standard applied because the plaintiff was involved in a matter of public interest. *Id.* at 44-45.

The public interest approach set forth in *Rosenbloom* was discredited in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The Supreme Court asserted that the public interest approach failed to adequately accommodate the state's interest in protecting a private individual's reputation. *Id.* at 346. In repudiating *Rosenbloom*, the Court asserted that the *Rosenbloom* test would allow state and federal judges to decide on an ad hoc basis which issues amounted to matters of general or public interest. *Id.* at 339. In holding that the plaintiff, a private attorney, was not a public figure, the Court presented an in-depth analysis of the public figure doctrine. The *Gertz* analysis is presently the focal point used by the Supreme Court for determining public figure status. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 136 (1979)(government-funded researcher not considered public figure under *Gertz* analysis); Time, Inc. v. Firestone, 424 U.S. 448, 455 (1976)(wealthy socialite involved in public divorce scandal not *Gertz* limited public figure).

Recognizing that public figure status varied in degrees, the Court established two general categories of public figures. *Gertz*, 418 U.S. at 351. First, a person may attain "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Id.* Second, a person may voluntarily inject himself or be drawn into a public controversy and thus become a public figure for limited purposes. *Id.* at 345. The Court mentioned that in a very rare case someone might become an involuntary public figure by no purposeful action on his part. *Id.*

The *Gertz* Court set forth two characteristics that distinguished private individuals from public figures. First, because public figures possessed greater access to the channels of communications, they could counter false statements more effectively than private figures. *Id.* at 344. Second, public figures, by inviting public attention, assumed the risk that accompanied their prominent role in society. *Id.* The Court concluded that private individuals needed greater protection and should not be prevented from possible recovery because of the stricter *New York Times* standard. *Id.* at 347-48.

[17] *Ferguson*, 448 So. 2d at 277; *see infra* notes 34-36 and accompanying text.

[18] *Ferguson*, 448 So. 2d at 277-78. The use of the term "vortex" in *Ferguson* is not without precedent. The United States Supreme Court used the word "vortex" in both Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) and Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The term "vortex public figure" has appeared in several federal district and state court opinions. *See, e.g.*, Velle Transcendental Research Ass'n, Inc. v. Sanders, 518 F. Supp. 512, 515 (C.D. Cal. 1981)(vortex public figure is another name for limited purpose public figure); Steaks Unlimited, Inc. v. Deaner, 468 F. Supp. 779, 784 (W.D. Pa. 1979)(vortex public figure is public figure in limited scope of issues); A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71, 82-84 (Tex. App. 1982)(vortex public figure is one who

may not recover in a defamation action absent proof of "actual malice."[19]

The lawsuit in *Ferguson* arose from a newspaper editorial in which one of the defendants[20] criticized the operations of a publicly-funded hospital.[21] The plaintiffs,[22] three of the hospital's emergency room doctors, had confronted the recently-hired hospital administrator over policy matters and personal conflicts.[23] The conflict culminated when the doctors issued a "him or us" ultimatum to the Board of Trustees.[24] After the Board of Trustees refused to renew the administrator's contract, the defendants published an editorial which supported the administrator and disfavored the doctors.[25] The plaintiffs filed a defamation suit in the Circuit Court of Marshall County and the jury returned a verdict for the plaintiffs awarding compensatory damages.[26] The circuit judge granted the defendants' motion for a judgment notwithstanding the verdict and awarded the plaintiffs nominal damages.[27] The doctors appealed, urging reinstatement of the jury verdict.[28] On appeal, the Mississippi Supreme Court, *held*, affirmed.[29] Even if the editorial's criticism was caustic, contemptuous and unfair, absent clear

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voluntarily injects himself into public controversy).

[19] *Ferguson*, 448 So. 2d at 278-79.

[20] The defendants were William E. Watkins, author of the editorial; Pam McPhail, editor of the The North Mississippi Times; and North Mississippi Communications, Inc., publisher of the newspaper. *Id.* at 274.

[21] *Id.* at 273-74.

[22] The plaintiffs were Drs. Charles B. Ferguson, Robert P. Tate and David S. Anderson, physicians in charge of the Marshall County Hospital's emergency room. *Id.* at 273-74.

[23] *Id.* at 273.

[24] *Id.*

[25] *Id.* Criticism of the doctors focused on their lucrative salaries and their desire for the dismissal of the administrator. *Id.*

[26] *Id.* at 274.

[27] *Id.* Plaintiffs were awarded one dollar each. *Id.*

[28] *Id.* The defendants did not cross-appeal, but accepted the final judgment awarding nominal damages. *Id.*

[29] *Id.* at 280. The court upheld the trial court's award of nominal damages, even though the editorial was not libelous. The court reasoned that considering the procedural context of the case, the only question before it was whether the original jury verdict should be reinstated. *Id.* at 275. In his dissent, Justice Bowling forcefully argued that if the editorial were not libelous, then the plaintiffs "were not entitled to one thin dime." *Id.* at 282 (Bowling, J., dissenting). Justice Bowling concluded that the plain error rule should have applied to reduce the judgment to zero. *Id. See* MISS. SUP. CT. RULES, Rule 6(b) (court may at its discretion notice plain error which is not assigned or specified by counsel).

falsity of fact, it was not libelous.[30] Moreover, the doctors were vortex public figures who had to prove "actual malice" to recover damages.[31]

While the court's evaluation of whether the editorial defaming the plaintiffs was routine,[32] its analysis of the public figure concept significantly affects the ability of plaintiffs in defamation actions to recover damages under Mississippi law.[33] In determining whether the plaintiffs

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[30] *Ferguson*, 448 So. 2d at 273. The court observed, "[t]here is no such thing as a libelous idea." *Id.* at 275. Furthermore, an opinion is actionable only if it "clearly and unmistakably impl[ies] the allegation of undisclosed, false and defamatory facts as the basis for the opinion." *Id.* at 275-76. The court found that the thrust of the editorial was an attack upon the governing authorities of Marshall County, not the doctors, and that the factual accuracy of statements concerning the doctors was not questioned. *Id.* at 276.

[31] *Id.* at 279-80. As the dissent noted, the court could have ended its opinion upon finding that the editorial was not defamatory. *Id.* at 282-83 (Bowling, J., dissenting). Justice Bowling observed that the United States Supreme Court has stated that "dispositive issues of statutory or local law are to be treated before reaching constitutional issues." *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 161 n.2 (1979); *see also* Hutchinson v. Proxmire, 443 U.S. 111, 122 (1979) ("Our practice is to avoid reaching constitutional questions if a dispositive nonconstitutional ground is available"). Determining the status of a defamation plaintiff and the appropriate standard implicates constitutional considerations. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 333 (1974)(reconciling defamation law with first amendment); Curtis Publishing Co. v. Butts, 388 U.S. 130, 135 (1967)(relationship between libel law and freedom of press); New York Times, Inc. v. Sullivan, 376 U.S. 254, 264 (1964)(rule of law applied by Alabama courts constitutionally deficient). The Mississippi Supreme Court could have avoided reaching constitutional issues and possibly a split in the court by relying solely on the holding that the defendants' editorial was not libelous. All justices agreed that the statements were not libelous. *See Ferguson*, 448 So. 2d at 280; *id.* at 282 (Roy Noble Lee, J., specially concurring); *id.* at 286 (Bowling, J., dissenting).

[32] *Ferguson*, 448 So. 2d at 275-76; *see supra* note 30 and accompanying text.

[33] Early Mississippi case law provided substantial protection of an individual's reputation by holding that any statements which injured an individual's reputation were actionable per se. *See, e.g.*, Wrought Iron Range Co. v. Boltz, 123 Miss. 550, 558-59, 86 So. 354, 355 (1920)(words which injure individual's reputation are actionable per se); Binns v. Stokes, 27 Miss. 239, 243 (1853)(court presumed defendant published defamatory statements with malice). The Mississippi Supreme Court has stated that "at common law any written or printed language which tends to injure one's reputation, and thereby expose him to public hatred, contempt or ridicule, degrade him in society, lessen him in public esteem or lower him in the confidence of the community is actionable per se." Conroy v. Breland, 185 Miss. 787, 797, 189 So. 814, 815 (1939). Damages to reputation were presumed to result from injurious language and truth was no defense where the words were prohibited by statute. *See* Jefferson v. Bates, 152 Miss. 128, 132, 118 So. 717, 718 (1928)(truth was no defense for words that were actionable per se).

In 1955, however, the Mississippi Supreme Court held that publications dealing with political matters, public officials or political candidates were entitled to a measurable privilege because of the involvement of the public interest. *See* Krebs v. McNeal, 222 Miss. 560, 576, 76 So. 2d 693, 699 (1955). This "fair comment" privilege contained the significant limitation that "accusations of crime, dishonesty, fraud, corruption, immoral-

were subject to the actual malice standard established in *New York Times Co. v. Sullivan*,[34] the court relied on *Edmonds v. Delta Democrat Publishing Co.*,[35] a decision pre-dating *New York Times*. The *Ferguson* court interpreted *Edmonds* as establishing a "liberal concept of a quasi-public figure," that is, a private figure who attains public status by injecting himself into a matter of legitimate public concern.[36] The court explained that an *Edmonds* quasi or vortex public figure must prove "actual malice" when he brings an action arising out of a matter of legitimate interest.[37] Such a matter, the court stated, need not produce actual controversy, but could be any matter in the public domain.[38] Emphasizing that the hospital, the "nerve center" of health services, was built and operated by public funds, the court concluded that the operation of the hospital was a matter of legitimate public interest.[39] The court asserted that nothing in *Gertz v. Robert Welch, Inc.*[40] or *New York Times* required a more restrictive definition of pub-

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ity, etc., and imputations of dereliction of duty, favoritism, or misconduct in office," were not privileged. *Id.* at 576, 76 So. 2d at 699. For a good discussion of the historical development of defamation in the common law, including the separation of libel and slander, see Lovell, *The "Reception" of Defamation By the Common Law*, 15 VAND. L. REV. 1051 (1962).

[34] 376 U.S. 254, 279-80 (1964).

[35] 230 Miss. 583, 93 So. 2d 171 (1957). In *Edmonds*, a city newspaper was sued by the executive secretary of the United Dry Association of Mississippi. *Id.* at 588, 93 So. 2d at 172. The editorial at issue contained factually based criticisms of the plaintiff's public statements concerning a liquor referendum. *Id.* at 589, 93 So. 2d at 172-73. While noting that every citizen was entitled to a good reputation, the court emphasized that a person "who prominently comes forward in any way and becomes a public or quasi-public figure invites free expression of public opinion, including criticism." *Id.* at 590-91, 93 So. 2d at 173. In *Edmonds*, the court reasoned that the interests of society required that immunity be available to those who discussed or criticized public affairs. *Id.* This privilege was not without limitations. The court stated that such criticism was privileged only if it (1) were in opinion form, (2) were fair, in that the reader could understand the factual basis of the criticism, and (3) were related to the individual's public life and dealt with a public interest matter. *Id.* The court asserted that the privilege could not be invoked if the statements had been published with spite, ill will, culpable recklessness, or negligence. *Id.*, 93 So. 2d at 174.

[36] *Ferguson*, 448 So. 2d at 277-78.

[37] *Id.* The court acknowledged that actual malice was authoritatively defined in *New York Times*. *Id.* at 277; *see supra* note 16.

[38] *Ferguson*, 448 So. 2d at 278. The court further stated that the hospital administrator, who instituted programs which rankled the medical staff, was a center of controversy in both the hospital and in the county government. Moreover, even if the doctors had not been public figures before the controversy, their issuance of the "him or us" ultimatum made them vortex public figures. *Id.* at 279.

[39] *Id.* at 279.

[40] 418 U.S. 323 (1974); *see supra* note 16.

lic figure[41] and concluded that the vortex public figure was grounded in the Mississippi Constitution and was foreshadowed by the liberal spirit of *Edmonds*.[42]

Although *Ferguson* will further the dissemination of public information and free the media to inform the citizenry on matters of social interest, the Mississippi Supreme Court has extended protection of free speech beyond the current position of the United States Supreme Court. *Gertz* and its progeny established several requirements that must be met before a private individual becomes a limited-purpose public figure. Specifically, an individual becomes a limited-purpose public figure when he "thrusts himself into a matter of public controversy in order to influence the resolution of its issues."[43] Explicit in this formulation are the requirements of voluntariness of action and the existence of a public controversy. The Mississippi Supreme Court, however, stated that a private individual may become a vortex public figure by either voluntary or involuntary activity.[44]

Read broadly, *Ferguson* could allow the media to negligently, falsely defame any public employee at a publicly funded institution regardless of the employee's position, influence or desire to remain inconspicuous. Furthermore, the *Ferguson* court stated that the public interest need not be a public controversy, a significant contrast to the holding in *Gertz*.[45] The Mississippi Supreme Court's substitution of a

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[41] *Ferguson*, 448 So. 2d at 278-79.

[42] *Id.* at 279.

[43] *Gertz*, 418 U.S. at 345. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), Time magazine was sued for libel because of an inaccurate report of the plaintiff's divorce proceedings. *Id.* at 452. Although the plaintiff was a well-known wealthy socialite, the Court refused to categorize her as even a limited-purpose public figure. *Id.* at 455. The Court asserted that the plaintiff had not thrust herself to the forefront of the public controversy. *Id.* at 454-55. The Court noted that the plaintiff did not choose public prominence but rather was compelled to go to court for a divorce. *Id.* at 454. The Court also refused to equate "interest to the public" with "public controversy" as in *Gertz*. *Id.* at 454. To hold that divorce proceedings constituted a public controversy, the Court reasoned, would be to reinstate the *Rosenbloom* public interest. *Id.; see supra* note 16.

[44] *Ferguson*, 448 So. 2d at 277-78.

[45] *See Gertz*, 418 U.S. at 352. In another significant case, Hutchinson v. Proxmire, 443 U.S. 111 (1975), the Court held that concern or interest over general public expenditure was insufficient to satisfy the public controversy requirement. *Id.* at 135. Additionally, the Court held that public concern over public expenditures was insufficient to vest an otherwise private individual with public figure status. *Id.* If public interest in government spending were sufficient, everyone who received or benefitted from public grants would be deemed public figures. *Id.* The Court concluded that "the use of subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests

"matter in the public domain" for the public controversy requirement could possibly encompass an infinite number of situations.[46]

II. Negligent Misrepresentation

In *Berkline Corp. v. Bank of Mississippi*,[47] the Mississippi Supreme Court for the first time announced the elements of a negligent misrepresentation claim.[48] Previously, the supreme court had enumer-

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in this area." *Id.* (citing Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976)).

[46] The broad nature of the *Ferguson* vortex public figure is illustrated by its application to the facts of the recent Supreme Court cases discussed above. While in *Gertz*, *Firestone*, and *Hutchinson*, the Supreme Court held the plaintiffs to be private individuals, under *Ferguson*, those plaintiffs might be considered vortex public figures.

It is arguable that Gertz's position as a private attorney in "public" litigation against a "public" police department would be considered a "matter within the public domain." *See supra* note 16. Mrs. Firestone's divorce or domestic problems in general could also be deemed sufficient to invoke the actual malice standard. *See supra* note 43. Finally, the expenditure of public funds in *Hutchinson* would have unquestionably made Hutchinson a vortex public figure under *Ferguson*. *See supra* note 45.

[47] 453 So. 2d 699 (Miss. 1984).

[48] *Id.* at 702. The court observed that "[a]s all know, however, running deep in our law is the notion that a person must respond where his statements or conduct reasonably induce another to rely to his detriment." *Id.* The court stated that Mississippi law on equitable estoppel and promissory estoppel was analogous. *Id.*; *see* PMZ Oil Co. v. Lucroy, 449 So. 2d 201, 204, 207-09 (Miss. 1984)(in injunction action, subdivision developer equitably estopped from constructing townhouses because home builders reasonably relied on unrecorded restriction that only allowed one single-family house per lot)(cited in *Berkline*, 453 So. 2d at 702); Sanders v. Dantzler, 375 So. 2d 774, 776-77 (Miss. 1979)(doctrine of promissory estoppel applied to prevent defendant from raising statute of frauds as defense to action for breach of oral contract)(cited in *Berkline*, 453 So. 2d at 702). The Mississippi Supreme Court also relied upon the legal reasoning of courts from other jurisdictions. *Berkline*, 453 So. 2d at 702; *see* Nevada Nat'l Bank v. Gold Star Meat Co., 89 Nev. 427, 514 P.2d 651, 654 (1973)(bank responsible to seller for misrepresentations concerning credit rating of prospective purchaser); Anchor Lumber Corp. v. Manufacturers' Trust Co., 242 A.D. 656, 272 N.Y.S. 610, 611 (1934)(per curiam)(bank accountable for pecuniary loss suffered by seller in reliance upon bank's information as to customer's bank account).

Prior to *Berkline*, the court had indicated the availability of a cause of action for negligent misrepresentation. *See* First Money, Inc. v. Frisby, 369 So. 2d 746, 750 (Miss. 1979). In *First Money*, the court determined that while the plaintiff had characterized his claim as one for "negligent misstatement," the claim appeared to charge fraud. *Id.* at 750. Without listing the elements of a negligent misrepresentation claim, the court determined that even if the plaintiff's declaration were sufficient to state such a cause of action, the evidence was insufficient to allow this theory to be considered by the jury. *Id.* In arriving at this conclusion, the court did note that the claims of negligent misrepresentation and fraud were distinct causes of action. *Id.* The court observed that "[t]he basis for damages resulting from negligent misrepresentation is the lack of care; the basis for damages resulting from fraud is the want of honesty." *Id.*

ated the elements of a claim for misrepresentation based on a theory of fraud, but not of negligence.[49] The *Berkline* decision left unaffected the viability of a fraudulent misrepresentation claim grounded in the requisite element of proof by clear and convincing evidence.[50]

Berkline Corporation, a furniture wholesaler, contacted the Bank of Mississippi in an effort to determine the creditworthiness of Furniture City, Inc., a retail furniture business.[51] The bank responded with a letter which included information covering Furniture City's line of credit and deposit accounts with the bank, as well as observations regarding the bank's credit experience with Furniture City and the business judgment of the company's principals.[52]

Berkline subsequently shipped merchandise on credit to the furniture retailer.[53] However, Furniture City failed to make any payments to Berkline and, thereafter, went bankrupt.[54] The distribution that Berkline received from the bankrupt estate of Furniture City was less

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[49] *See* Franklin v. Louitt Equip. Co., 420 So. 2d 1370, 1373 (1982). In *Franklin*, the Mississippi Supreme Court stated that the elements of an action for fraudulent misrepresentation are the following:

> (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury.

Id. at 1373; *see also* Johnson v. Brewer, 427 So. 2d 118, 121 (Miss. 1983)(citing Crawford v. Smith Brothers Lumber Co., 274 So. 2d 675, 678 (Miss. 1973) for the same enumeration of elements).

[50] *See Berkline*, 453 So. 2d at 703; *see infra* note 59 and accompanying text (elements of negligent misrepresentation). Although the elements of fraud must be proven by clear and convincing evidence, other issues in a case based on fraud require proof by a preponderance of the evidence. Vogel v. American Warranty Home Serv. Corp., 695 F.2d 877, 882 (5th Cir. 1983)(applying Mississippi law).

[51] *Berkline*, 453 So. 2d at 700. Berkline's first business contact with Furniture City occurred when Furniture City placed an order with Berkline for the purchase of furniture. In response to Berkline's request for credit references, Furniture City furnished the name of Steve Smith, an officer of the Bank of Mississippi. *Id.*

[52] *Id.* The letter signed by Steve Smith, a bank loan officer, stated that Furniture City had an open line of credit "in the low six figure range." Further, the correspondence disclosed that the furniture retailer had a savings account "in the low six figure range" and a business checking account with an average deposit balance "in the low five figure range." *Id.* The bank's letter clearly indicated that Furniture City was a satisfactory deposit and loan customer and that the corporate principals were sound businessmen. *Id.*

[53] *Id.* The approximate wholesale value of the merchandise shipped by Berkline was $10,000. *Id.*

[54] *Id.* In the words of Justice Robertson, "Furniture City was named guest of honor in a petition for involuntary bankruptcy. . . ."*Id.*

than the amount of the debt.[55] Consequently, Berkline filed suit in the Circuit Court of DeSoto County against the Bank of Mississippi, alleging damages caused by reliance upon material misrepresentations made by the bank about the creditworthiness of Furniture City.[56] The circuit court regarded the claim as one for fraudulent misrepresentation and dismissed the action on the ground that Berkline failed to make a prime facie showing of fraud.[57]

On appeal, the Mississippi Supreme Court ruled that under Mississippi law a plaintiff who properly alleges and proves his claim may recover from a bank under either a fraudulent misrepresentation or negligent misrepresentation theory.[58] The court stated that to recover for negligent misrepresentation the plaintiff must allege and prove by a preponderance of the evidence the following:

> (a) A misrepresentation or omission of a fact;
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> (b) That the representation or omission is material or significant;
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> (c) That in responding to the credit inquiry the bank officer failed to exercise that degree of diligence and expertise the public is entitled to expect of reasonably competent bank officers;
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> (d) That it reasonably relied upon the bank's misrepresentation or omission; and
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> (e) That it suffered damages as a direct and proximate result of such reliance.[59]

Accordingly, the court reversed and remanded the case for further proceedings to determine the question of liability under a theory of negligent misrepresentation.[60]

As a result of the instant case, the court will probably be challenged in future cases to define the scope of negligent misrepresentation.[61] Although the holding of *Berkline* is restricted to negligent mis-

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[55] *Id.* Berkline suffered a loss $6,605.79. *Id.*

[56] *Id.* at 699-700. Additionally, Berkline alleged fraudulent misrepresentation by the bank and demanded punitive damages. *Id.* at 700-01.

[57] *Id.* at 700-01.

[58] *Id.* at 703.

[59] *Id.* at 702.

[60] *Id.* at 703. The court noted that in proceedings on remand the bank could reassert its motion to dismiss at which time the trial judge should test Berkline's case against the rules of law set forth in the instant opinion. The court stated that nothing in its opinion should be taken to indicate whether the trial judge should grant or deny such a motion. *Id.*

[61] The most famous expression of concern for the potentially unlimited extent of

representation by a bank, it is noteworthy that recovery was allowed for pecuniary loss only; there was no personal injury or property damage.[62] *Berkline* does make clear, however, that the cause of action will lie only for negligent misrepresentation of a material fact, not of opinion.[63]

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liability to third parties is found in Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 41, 444 (1931). In *Touche*, which involved a negligent audit by an accounting firm, then state Chief Justice Cardozo stated the following:

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.

Id. See generally W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS, § 107, at 746-48 (5th ed. 1984)(noting difficulties in assessing monetary damages due to reliance by third person on representation made by professional).

[62] *Berkline*, 453 So. 2d at 699-700. The Mississippi Supreme Court did not specify any particular type of damage that must be suffered by a plaintiff as a prerequisite to recovery. *Id.* at 702-03. The view that economic injury is sufficient in an action for negligent misrepresentation has been clearly expressed by courts in only a few jurisdictions, including California and New Hampshire. W. PROSSER AND W. KEETON, *supra* note 61, § 107, at 745-46.

In Gagne v. Bertran, 275 P.2d 15, 21-22 (Cal. 1954), Justice Traynor wrote that the measure of monetary damages recoverable for negligent or deceitful representation by a professional was limited to "actual losses suffered because of the misrepresentation." *Id.* The *Gagne* court found that a soil expert was not responsible for increased building cost because "the additional expense flowed from the condition of . . .[the] land." *Id.* at 23; *see also* Progressive Survey, Inc. v. Pearson, 410 A.2d 1123, 1125 (N.H. 1980)(developer may not recover grading cost in excess of actual damages due to error in contour profile by surveyor whether claim lies in tort or contract).

[63] *See Berkline*, 453 So. 2d at 702; *cf.* Bullard v. Citizens Nat'l Bank, 173 Miss. 450, 466, 160 So. 280, 282 (untrue representations by bank officer that bonds were "gilt-edged and good as gold" held statement of opinion, not fact, thereby exonerating officer from liability for that particular misstatement), *suggestion of error overruled*, 173 Miss. 470, 471, 162 So. 169, 169-70 (1935).

RECENT DECISIONS

Racketeer Influenced and Corrupt Organizations Act—Private Cause of Action—No Injury Required Beyond Those Caused by Predicate Offenses for Section 1964(c) Claim

Plaintiffs,[1] seeking compensation for excessive interest charges paid to defendant bank,[2] brought an action against defendants[3] in the United States District Court for the Northern District of Illinois under the civil provision, section 1964(c),[4] of the Racketeer Influenced and Corrupt Organizations Act (RICO).[5] Plaintiffs asserted that the use of the mails by defendants to impose a fraudulently excessive interest rate[6] established a pattern of racketeering activity[7] as prohibited by

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[1] Plaintiffs were Haroco, Inc., Roman Ceramics, Inc., California Originals, Inc., and Mike Wayne Distilled Products Company. Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 385 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902, *aff'd*, 105 S. Ct. 3291 (1985).

[2] *Id.* Plaintiffs borrowed several million dollars from defendant bank between 1979 and 1981 at an interest rate to be calculated at one percent above the prime rate of the bank. *Id.* Plaintiffs claimed that defendants fraudulently calculated the prime rate. *Id.*

[3] *Id.* Defendants were American National Bank and Trust Company of Chicago; Ronald J. Grayheck, an officer and director of American National Bank; and Walter E. Heller International Corporation, the parent company of American National Bank. *Id.*

[4] *Id.* The claim accrued under 18 U.S.C. § 1964(c) which sets forth the private cause of action under RICO:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c)(1982).

Plaintiffs alleged that defendants violated § 1962(c). *Haroco*, 747 F.2d at 385; *see also infra* note 8.

[5] Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961-1968 (1982).

[6] *Haroco*, 747 F.2d at 385. The court found that mail fraud occurs when a person

section 1962(c) of RICO.[8] The United States District Court for the Northern District of Illinois dismissed the suit for failure to plead a specific RICO injury.[9] The plaintiffs had alleged an injury stemming from mail fraud, one of the predicate offenses of RICO.[10] The United States Court of Appeals for the Seventh Circuit, *held*, affirmed in part[11] and reversed and remanded in part.[12] Where injury to business

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uses the mails for the purpose of executing a scheme or artifice to defraud. *Id.* at 386. Plaintiffs alleged that defendants committed mail fraud to establish a fraudulent interest rate. *Id.*

[7] *Id.* Racketeering activity is defined in terms of numerous state and federal crimes including mail fraud. *Id.*; *see* 18 U.S.C. § 1961(1)(1982). A pattern of racketeering activity required a minimum of two acts of racketeering activity within a ten year period. *Id.*; *see* 18 U.S.C. § 1961(5)(1982).

[8] *Haroco*, 747 F.2d at 386. Section 1962(c) of RICO provides the following:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c)(1982).

[9] *Haroco*, 747 F.2d at 386. The district court dismissed the claim because plaintiffs pleaded no injury from a RICO violation other than those resulting from the predicate offenses, the acts of mail fraud. *Id.*

[10] *Id.* The predicate offenses were the underlying acts of racketeering that constituted the pattern. *Id.*; *see supra* note 7. For example, each use of the mails by defendants amounted to a predicate offense because it was an individual act of racketeering. *Id.* The interpretation by the district court of the statutory language in § 1964(c) stating that the RICO plaintiff must be injured "by reason of a violation of section 1962" caused the claim to be dismissed. *Haroco*, 747 F.2d at 387. The court failed to explain what injury from a RICO violation would suffice to prevent dismissal. *Id.* at 387. The additional injury is often termed "racketeering injury" by courts which require such injury. *Id.*

[11] *Id.* at 402. The court affirmed the dismissal insofar as it relieved American National Bank from liability for conducting its own affairs through a pattern of racketeering activity. *Id.* Although a corporation such as American National Bank could fulfill the definitions of both "person" and "enterprise" under 18 U.S.C. § 1961, the "person" and the "enterprise" by which he is employed must be separate legal entities under the requirements of 18 U.S.C. § 1962(c). *Haroco*, 747 F.2d at 400.

[12] *Haroco*, 747 F.2d at 405. The court held that American National Bank could be liable under § 1962(c) for conducting the affairs of its parent corporation, Heller International, through a pattern of racketeering activity. *Id.* at 402. Since American National Bank was a subsidiary corporation, it was a separate legal entity from its parent corporation and satisfied the requirements of § 1962(c). *Id.* at 402. The court further held that the pleadings for a § 1964(c) action need not be as specific as those required for a criminal prosecution. *Id.* at 404. Thus the pleadings need not set forth facts sufficient to show probable cause. Instead, the normal civil standard for pleadings applies for civil RICO actions. *Id.*

or property results from the underlying acts of racketeering or predicate offenses, a civil action exists under section 1964(c) without a requirement of further injury from the RICO violation. *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902 (1985). The United States Supreme Court, *held*, affirmed.[13] The injury resulting from the predicate offenses alone is enough to state a claim under section 1964(c) of RICO. *American National Bank & Trust Co. v. Haroco, Inc.*, 105 S. Ct. 3291 (1985).

The Racketeer Influenced and Corrupt Organizations Act[14] was enacted by Congress to impede the increasingly pervasive influence of organized crime in America.[15] The United States Senate proposed RICO to provide extensive federal criminal[16] and civil[17] remedies.[18] The United States House of Representatives amended the bill to include a private cause of action, section 1964(c),[19] and Congressional debate ensued on the potential breadth of RICO's application.[20] Congress enacted RICO[21] without further restriction of its expansive terms and

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[13] American Nat'l Bank & Trust Co. v. Haroco, Inc., 105 S. Ct. 3291 (1985).

[14] 18 U.S.C. §§ 1961-1968 (1982).

[15] *See generally Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, on S. 30 and Related Proposals, Relating to the Control of Organized Crime in the United States*, 91st Cong., 2d Sess. 157 (1970)(rise of organized crime in the United States)[hereinafter cited as *House Hearings*]; *Hearings Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiciary*, 91st Cong., 1st Sess. 61 (1969)(problem of organized crime in America); *see also* 1970 U.S. CONG. & AD. NEWS 4010 (legislative history and purpose); Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 838-45 (1980)(discussion of legislative history of RICO).

[16] 18 U.S.C. § 1963 (1982). Criminal remedies include a fine of up to $25,000, imprisonment of up to 20 years, and forfeiture provisions. *Id.*

[17] 18 U.S.C. § 1964 (1982). Civil remedies include injunctions, divestitures, and dissolution or reorganization of any enterprise. *Id.*

[18] *See* 116 CONG. REC. 18, 913-14 (1970)(comments of RICO's sponsor, Senator McClellan (D-Ark.) noting breadth of statute).

[19] *House Hearings, supra* note 15, at 559; *see supra* note 4. The American Bar Association and Representative Sam Steiger (R-Ariz.) recommended this amendment. *Id.* at 520, 548. There was little debate. Only three statements regarding § 1964(c) were made on the House floor. *See* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 490 n.22 (2d Cir. 1984).

[20] *House Hearings, supra* note 15, at 342, 370 (City of New York Bar Association protested RICO's reach beyond organized crime); *id.* at 490, 504 (American Civil Liberties Union objected to potential reach of RICO); 116 CONG. REC. 852 (Senator Young (D-Ohio) stated RICO was too broad). *But see* 116 CONG. REC. 35, 204 (1970)(Congressman Poff (R-Va.) sponsor of House bill, stated RICO's breadth eliminated danger of status-based legislation).

[21] 116 CONG. REC. 37,264 (1970). President Nixon signed the bill into law on October 15, 1970. *Id.*

even added a provision which encouraged liberal construction of the statute.[22] Many courts have focused on the legislative history of RICO, examining Congress' intent to aid in their interpretation of the statute.[23] In *United States v. Capetto*,[24] the United States Court of Appeals for the Seventh Circuit held the civil remedies provision[25] of RICO constitutional.[26] The government sought an injunction under RICO in order to prohibit the gambling activities of defendants.[27] The court held, contrary to defendants' assertion, that it was not Congress' intention that irreparable injury to the public be shown before such an injunction was granted.[28]

Addressing the importance of an organized crime element, the Seventh Circuit held, in *United States v. Aleman*,[29] that although the stated purpose of RICO was to eradicate organized crime,[30] neither the language nor the legislative history of RICO necessitated a connection with organized crime for a criminal action under the statute.[31] The

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[22] Organized Crime Control Act of 1970, Pub. L. 91-452, § 904(a), 84 Stat. 947 (historical note). Congress stated that the statute should be liberally construed to aid its remedial purposes. *Id.*

[23] *E.g.*, Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984)(discussion of statutory interpretation and legislative history of RICO); *In re* Cantanella, 583 F. Supp. 1388, 1428-34 (E.D. Pa. 1984)(same); Harper v. New Japan Sec. Intern, Inc., 545 F. Supp. 1002, 1004-05 (C.D. Cal. 1982)(same).

[24] 502 F.2d 1351 (7th Cir. 1974).

[25] 18 U.S.C. § 1964 (1982); *see supra* note 16.

[26] *Capetto*, 502 F.2d at 1351. The defendants received horse and sport wagers and qualified as an illegal gambling business in violation of § 1962(b). *Id.* at 1355. The United States proceeded under § 1964(c) in order to enjoin further gambling activities by the defendants. *Id.* The court held that § 1964 was not unconstitutionally vague and did not violate the commerce clause. *Id.* at 1358. The court also held that Congress had the power to provide for both civil and criminal enforcement of a statute. *Id.* at 1357. Furthermore, activities affecting interstate commerce were subject to civil sanctions whether those activities were also made criminal by state or federal law. *Id.* at 1356; *see also In re* Debs, 158 U.S. 564, 599 (1895)(federal injunctive relief available for acts prohibited by criminal law).

[27] *Capetto*, 502 F.2d at 1355.

[28] *Id.* at 1358-59. The inherent injury to the public resulting from the activities proscribed by § 1962 satisfied the statutory requirements for an injunction as intended by Congress. *Id*.

[29] 609 F.2d 298 (7th Cir. 1979).

[30] *Id.* at 303; *see* United States v. Lemm, 680 F.2d 1193, 1198 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983)(RICO intended to eradicate organized crime); Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 922-23 (Congressional statement of findings and purposes); *supra* note 15 and accompanying text.

[31] *Aleman*, 609 F.2d at 303. The government asserted that the defendants violated RICO through a series of home burglaries that constituted a pattern of racketeering activity. *Id.* at 301-02. The court noted that Congress exhibited its ability to limit a provi-

next year, in *Parnes v. Heinold Commodities, Inc.*,[32] the United States District Court for the Northern District of Illinois reached the same conclusion regarding a civil action.[33] The *Parnes* court held that where a plaintiff asserted that the defendant used the mails in a scheme to defraud him, no connection to organized crime need be shown as a prerequisite to a private suit for damages under section 1964(c).[34]

Construing the legislative history of section 1964(c), the district court in *North Barrington Development, Inc. v. Fanslow*,[35] held that to state a cause of action under that section the injury should result from an impairment of plaintiff's ability to compete in the open market.[36] The plaintiff alleged that the defendant utilized the mails in a fraudulent scheme involving the prospective construction of an apartment building.[37] The court reasoned that Congress did not intend the Act to encompass state law claims such as common law fraud;[38] there-

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sion to a person involved in organized crime in Title VI of the Organized Crime Control Act, 18 U.S.C. § 3503(a)(1982). *Aleman*, 609 F.2d at 303. If the statutory conditions were met, the court reasoned that the Act applied beyond organized crime. *Id.; see also* United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975)(no organized crime nexus required by RICO); McClellan, *The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 144 (1970)(prohibited activities under RICO are merely characteristic of organized crime).

[32] 487 F. Supp. 645 (N.D. Ill. 1980).

[33] *Id.* at 646. Plaintiff alleged that defendant used the United States Postal Service in a scheme to defraud him and thus violated 18 U.S.C. §§ 1341 and 1962(c). *Parnes*, 487 F. Supp. at 646.

[34] *Parnes*, 487 F. Supp. at 646. The courts requiring an organized crime nexus based the prerequisite on their interpretation of the legislative history of RICO. *E.g.*, Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 747 (N.D. Ill. 1981)(legislative history required organized criminal activity); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975)(RICO aimed at organized crime); *see also* Bridges, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities,"* 18 GA. L. REV. 43, 77-78 (1983)(argument against use of organized crime nexus to limit RICO); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1106-09 (1982)(organized crime affiliation requirement was improper) [hereinafter cited as *Judicial Restriction*]; Note, *Civil RICO and "Garden Variety" Fraud—A Suggested Analysis*, 58 ST. JOHN'S L. REV. 93, 102-05 (1983)(rejected requirement of organized crime connection) [hereinafter cited as *"Garden Variety" Fraud*].

[35] 547 F. Supp. 207 (N.D. Ill. 1980).

[36] *Id.* at 211. The court reasoned that the purpose of RICO was to protect free competition. *Id.* at 210 (quoting United States v. Forsythe, 429 F. Supp. 715, 720 (W.D. Pa.), *rev'd on other grounds*, 560 F.2d 1127 (3d Cir. 1977)). Therefore, a plaintiff must suffer an injury to his competitive ability in order to state a claim under § 1964(c). *North Barrington*, 547 F. Supp. at 211; *see infra* note 40.

[37] *North Barrington*, 547 F. Supp. at 209.

[38] *Id.* at 210-11. The court reasoned that unless a distinct RICO injury was required, every fraud involving the use of the mails would give rise to a RICO claim. *Id.* at 211.

fore, a distinct RICO violation must have been alleged.[39]

Courts developed the *North Barrington* competitive injury requirement by analogizing section 1964(c) to the private cause of action in the antitrust laws, section 4 of the Clayton Act.[40] In *Landmark Savings & Loan v. Rhoades*,[41] plaintiffs alleged mail and wire fraud in the sale of securities and sought treble damages under section 1964(c).[42] The United States District Court for the Eastern District of Michigan reasoned that the analogy to the antitrust laws necessitated an injury of the type Congress intended RICO to deter,[43] a "racketeering enterprise injury," for a private cause of action.[44] Injuries from the predicate acts of racketeering alone did not constitute a racketeering injury.[45]

Mail fraud previously had been held to violate RICO and to establish a pattern of racketeering activity. *See, e.g.*, United States v. Weatherspoon, 581 F.2d 595, 602 (7th Cir. 1978)(each use of mails to defraud constituted act of racketeering).

[39] *North Barrington*, 547 F. Supp. at 211. The court stated that at a minimum the plaintiff must allege injury by a § 1962 violation to state a cause of action under § 1964. *Id.* The requirement for a § 1962 violation was that the resultant injury be distinct from an injury caused by the state law violation or mail fraud. *Id.*

[40] 15 U.S.C. § 15 (1982); *see, e.g.*, Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983)(civil RICO remedy modeled after antitrust law and required competitive injury), *aff'd*, 741 F.2d 511 (7th Cir. 1984); Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1007 (C.D. Cal. 1982)(RICO was analogous to antitrust law and required more than predicate offenses). *But see, e.g.*, Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982)(competitive injury not required by RICO), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S. Ct. 527 (1983); *In re* Cantanella, 583 F. Supp. 1388, 1431-34 (E.D. Pa. 1984)(principles of antitrust standing not applicable to civil RICO); Mauriber v. Shearson/Am. Express, Inc., 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983)(competitive injury requirements not consistent with legislative history). *See generally* Note, *Judicial Restriction*, *supra* note 34 at 1109-14 (competitive injury requirement was inconsistent with RICO's purpose).

[41] 527 F. Supp. 206 (E.D. Mich. 1981).

[42] *Id.* at 207.

[43] *Id.* at 208. The treble damages provision of § 4 of the Clayton Act applies only where the injury was the type Congress intended the antitrust statute to prevent—antitrust injury. *Landmark*, 527 F. Supp. at 208 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). Noting that racketeering injuries and competitive injuries were not identical, the *Landmark* court stated that the two injuries frequently overlapped. *Landmark*, 527 F. Supp. at 208-09.

[44] *Landmark*, 527 F. Supp. at 208. The plaintiff alleged only the predicate offenses; therefore, the court dismissed the action because a racketeering injury was not present. *Id.* at 209.

[45] *Id.* at 208. The court defined racketeering injury by stating that it was more than the predicate offenses, was not identical but similar to a competitive injury, and was the type of injury RICO was designed to deter. *Id. See generally* Bridges, *supra* note 34, at 67-72 (discussion of RICO injury requirement); Dzivi, *Civil RICO: Pleading Fraud for Treble Damages*, 45 MONT. L. REV. 100, 104 (1984)(racketeering injury defined inadequately by courts); Note, *"Garden Variety" Fraud*, *supra* note 34, at 105-111 (racketeer-

After *Landmark*, many courts required a racketeering injury without explaining or defining the term.[46]

In *United States v. Turkette*,[47] the United States Supreme Court, while ruling on section 1961(4) of RICO, established guidelines for the courts in the interpretation of the statute as a whole.[48] The Court stated that if the language of a statute is unambiguous, it must be regarded as conclusive in the absence of a clearly expressed legislative intent to the contrary.[49] The Court examined the legislative history and determined that Congress was aware of the scope of RICO; thus, the application of the statute shall not be restricted by the courts.[50] Pursuant to this broad construction, private claims under section 1964(c) proliferated as awareness of the statute increased.[51] In *Schacht*

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ing enterprise injury based on unclear distinctions).

[46] *E.g.*, Willamette Sav. & Loan v. Blake & Neal Fin. Co., 577 F. Supp. 1415, 1430 (D. Or. 1984)("[c]ourts recognize a racketeering enterprise injury when they see it"); Guerrero v. Katzen, 571 F. Supp. 714, 718-19 (D.D.C. 1983)(no definition of racketeering injury); King v. Lasher, 572 F. Supp. 1377, 1382 (S.D.N.Y. 1983)(racketeering injury prerequisite not defined); Hudson v. Larouche, 579 F. Supp. 623, 640 (S.D.N.Y. 1983)(racketeering injury required but not defined).

[47] 452 U.S. 576 (1981).

[48] *Id.* at 580. The Court resolved that the term "enterprise," which is found in § 1962(c) and defined in § 1961(4), included both legitimate and illegitimate organizations. *Id.* at 580-81. The Court ruled that § 1962(c) applied to the defendants described in the indictment as a group of individuals associated in fact and engaged in the trafficking of illegal drugs, arson, bribery of police, mail fraud and attempting to corruptly influence state court proceedings. *Id.* at 579. The Court ruled that § 1962(c) applied to defendants' illegitimate enterprise. *Id.* at 593. Although Congress' intention in the enactment of RICO was the prevention of the criminal infiltration of legitimate businesses, the Court reasoned that a definition of "enterprise" limited to legitimate businesses would place large segments of organized crime beyond the scope of the Act. *Id.* at 589-90. The Court held that the purpose and language of RICO indicated that Congress did not intend to limit RICO's scope solely to limited areas of organized crime or to organized crime's infiltration of legitimate businesses. *Id.* at 590.

[49] *Id.* at 580 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

[50] *Turkette*, 452 U.S. at 587; *see infra* note 77.

[51] *See* Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 486 (2d Cir. 1984). The *Sedima* court noted that the increased civil RICO litigation might have resulted from a law review article co-authored by Professor G. Robert Blakey and Brian Gettings that urged broad interpretation of the statute. *Id.* at 486. Professor Blakey was chief counsel of the Senate subcommittee which proposed the bill. *Id.*; *see* Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980)(article that contributed to increased number of RICO claims); *see also* Note, *Judicial Restriction*, *supra* note 34, at 1101-02 (RICO attracting attention); Note, *"Garden Variety" Fraud*, *supra* note 34, at 97 (controversy over RICO).

v. Brown,[52] the Seventh Circuit examined the legislative history and language of section 1964(c) and refused to limit its application.[53] The plaintiff sought treble damages for acts of mail fraud that contributed to the insolvency of an insurance company.[54] The defendants asserted that the injury alleged was not compensable under RICO.[55] First, the court in *Schacht* reiterated that a connection to organized crime was not necessary to a RICO claim.[56] Second, the *Schacht* court refuted the competitive injury requirement.[57] The court reasoned that Congress intended RICO to be sufficiently broad to ensure that organized crime would fall within its provisions and further reasoned that incorporation of the complex antitrust law into RICO was never intended.[58] Also, the court stated that RICO covered business and property directly injured by the racketeering activity.[59] Finally, the court held that it was the

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[52] 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983).

[53] *Schacht*, 711 F.2d at 1343.

[54] *Id.* Plaintiff claimed that defendants used the mails to misrepresent the insolvent state of the insurance company to the Illinois Department of Insurance. *Id.* Defendants concealed the insolvency through a fraudulent transfer to another corporation which caused the surplus allowance of the insurance company to appear to be in compliance with industry standards. *Id.* at 1345. Because the insurance company continued to operate in its insolvent state, damages to its policyholders and creditors exceeded $100,000,000. *Id.*

[55] *Id.* at 1350. Defendants stated that the use of civil RICO suits alleging ordinary business fraud duplicated existing state law and federal securities law and was not within the scope of the Act. *Id.* at 1354.

[56] *Id.* at 1353. The court noted that the weight of authority did not require an organized crime connection to state a claim under RICO. *Id.*; *accord*, Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir.)(no connection to organized crime necessary with RICO claim), *cert. denied*, 459 U.S. 880 (1982); Bennet v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982)(RICO plaintiff need not allege organized crime nexus), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S. Ct. 527 (1983); *Aleman*, 609 F.2d at 303 (no organized crime prerequisite for RICO); *see supra* note 31 and accompanying text.

[57] *Schacht*, 711 F.2d at 1358. The court noted that a competitive injury requirement narrowed the scope of RICO contrary to the statute's purpose. *Id.* The court concluded that a competitive injury requirement complied with neither the plain meaning nor the Congressional purpose of the statute. *Id.*

[58] *Id.* The court examined the Congressional debate on RICO and discounted the idea that the objectives of RICO and the antitrust laws were identical. *Id.* The court concluded that the comparisons to antitrust law were made to support the treble damages as a method of fighting organized crime. *Id.* The structural similarity of the provisions did not persuade the court that a competitive injury was required. *Id.* The court also noted that Congress refused to extend the Sherman Act to authorize recoveries of RICO's type. *Id.*

[59] *Id.* The court refused to accept defendant's argument that § 1964(c) applied only to parties injured as competitors and not to parties injured directly by the pattern of racketeering activity. *Schacht*, 711 F.2d at 1357. The indirect injury was another form of

predicate fraud offenses which brought about the insurance company's continued operation that caused injury to the plaintiff, and such injury satisfied the terms of section 1964(c).[60] The Seventh Circuit also found that the complaint properly alleged the existence of the necessary causal relationship between the damages to the plaintiff and the prohibited activity.[61] Other circuit courts of appeals reached the same result as *Schacht* and refused to impose limitations on the scope of RICO.[62]

RICO's application was severely restricted by a trio of cases decided by the United States Court of Appeals for the Second Circuit.[63] In *Sedima, S.P.R.L. v. Imrex Co.*,[64] the initial case, the plaintiff brought suit under section 1964(c) of RICO for falsification of purchase orders and credit memos by the defendant.[65] The Second Circuit dis-

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the competitive injury requirement. *Id.* at 1358.

[60] *Id.* at 1358-59. The defendants asserted that if the injury resulted only from the underlying acts of racketeering, then the injury was not "by reason of" a § 1962(c) violation and thus was not compensable under § 1964(c). *Id.* at 1358. The court held that the injury arose from the operation of the enterprise and was well within the scope of the statutory language. *Id.* at 1358-59.

[61] *Id.* at 1359. The court reasoned that § 1964(c) required that the injury result from activity prohibited in § 1962(c) in order to state a claim under RICO. *Id.*

[62] *See, e.g.*, Alcorn County, Mississippi v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1169 (5th Cir. 1984)(injury requirements of RICO to be read broadly); Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984)(Congress' decision to make RICO broad must be respected); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983)(not judiciary's role to restrict RICO), *cert. denied*, 104 S. Ct. 1280 (1984); Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982)(courts may not restrict RICO), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S. Ct. 527 (1983).

[63] *See* Furman v. Cirrito, 741 F.2d 524, 525 (2d Cir. 1984)(relied on precedent in requiring racketeering injury), *cert. granted*, 105 S. Ct. 3550 (1985); Bankers Trust Co. v. Rhoades, 741 F.2d 511, 516-17 (2d Cir. 1984)(mere proof of injury from predicate act insufficient), *cert. granted*, 105 S. Ct. 3550 (1985). The *Bankers Trust* court required that an injury actionable under RICO must have been a result of the pattern of racketeering. *Id.* The court required that the plaintiff prove that he would not have been injured "but for" the pattern of racketeering. *Id.* at 517; Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 485 (2d Cir. 1984)(imposition of special injury requirements for RICO civil action), *cert. granted*, 105 S. Ct. 901 (1985); *see also* Ashman, *Second Circuit Limits Reach of Civil RICO*, Sedima, S.P.R.L. v. Imrex, Co., No. 83-7965 (2d Cir. 1984), 70 A.B.A. J. 118, 118 (1984)(RICO restricted by Second Circuit); Flaherty, *A RICO Crisis: 2d Circuit Rulings Sharply Curb Civil Actions: Lawyers See Confusion Until High Court Acts*, Nat'l L.J., Aug. 13, 1984, at 1, col. 3 (injury requirements for private civil RICO claims).

[64] 741 F.2d 482 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 901 (1985).

[65] *Sedima*, 741 F.2d at 484. Sedima and Imrex agreed to jointly export electronic parts from the United States to Europe. Imrex acquired parts to fill the orders obtained by Sedima. *Id.* at 484-85. Sedima alleged that Imrex inflated its cost statements thereby

missed the action for failure to state a claim under RICO, holding that the injury needed for a RICO claim was something more than that caused by the predicate offenses.[66] The court reasoned that the legislative history of RICO and the language of the statute required an injury of the type RICO was designed to deter before a civil claim could be maintained.[67] In *Sedima*, the court justified the limitations it imposed by saying that the lack of comment on section 1964(c) indicated Congress was not aware of its possible applications.[68] In a companion case, *Bankers Trust Co. v. Rhoades*,[69] plaintiffs brought suit under section 1964(c) for fraudulent concealment of assets in a bankruptcy proceeding.[70] The Second Circuit held that an injury compensable under section 1964(c) must be caused by a violation of section 1962 and not merely by the underlying acts of racketeering.[71] The court in *Bankers Trust* stated that a violation of section 1962 occurred only where both a pattern of racketeering activity and the use of that pattern to invest

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defrauding the joint venture. *Id.*

[66] *Id.* at 496; *see supra* note 10.

[67] *Sedima*, 741 F.2d at 495, 496. The court noted that the "by reason of" language in § 1964(c) was taken from § 4 of the Clayton Act. *Id.* at 495; *see supra* note 4 for text of § 1964(c). The court analogized the requirement of an antitrust injury in a civil action under the Clayton Act to the injury requirement under RICO. *Id.* at 496. The court in *Sedima* concluded that the injury alleged must be of the type Congress intended RICO to prevent and not be merely the injury caused by the predicate offenses. *Id.* at 496; *see supra* note 43 (description of antitrust injury).

[68] *Sedima*, 741 F.2d at 492. The court objected to the application of the Racketeer Influenced and Corrupt Organizations Act to respected businesses. *Id.* at 487. The court declined to follow *Turkette* based on the criminal context of the case. *Id.* at 493. The court also found the statutory language ambiguous. *Id.* at 500. The court reasoned that Congress intended to create barriers to standing analogous to those in the antitrust laws even though imputing the actual antitrust standing requirements to a RICO claim would violate Congressional intent. *Id.* at 495.

In a dissenting opinion, Judge Cardamone refused to accept the majority's limitation of RICO stating that the courts should accord the statute its plain meaning. *Id.* at 504, 510 (Cardamone, J., dissenting). Judge Cardamone stated that both Congress and the Second Circuit had rejected the organized crime nexus requirement. *Id.* at 508 (citing Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 n.17 (2d Cir. 1983)). Accordingly, Congress accepted the risk that legitimate businesses would be affected rather than limiting the scope of RICO and making it less effective against the stated target. *Sedima*, 741 F.2d at 510; *see supra* note 19 (debate on § 1964(c)).

[69] 741 F.2d 511 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 3550 (1985).

[70] *Id.* at 513. Defendants conveyed stock so that it could not be attached during a bankruptcy proceeding. *Id.* Plaintiffs also alleged that defendants brought frivolous lawsuits and bribed a judge in order to discourage collection of the debt owed by defendants. *Id.* at 514. The district court dismissed the action for failure to allege a distinct RICO injury. *Id.* at 515.

[71] *Id.* at 516.

in, control, or conduct a RICO enterprise were present.[72] The third case, *Furman v. Cirrito*,[73] involved fraudulent acts by partners in the sale of a brokerage house.[74] The Second Circuit held that *Sedima* and *Bankers Trust* were controlling and thereby dismissed the complaint for failure to allege an injury caused by a distinct RICO violation.[75]

In the instant case, the court reasoned that since Congress conscientiously chose to enact the statute using broad terms,[76] and since no basis existed within the Act to construct limitations on its application,[77] then it is Congress and not the judiciary which is charged with restricting the scope of the statute.[78] Consequently, the excessive interest charges stemming from the underlying acts of racketeering, the mail fraud, satisfied the injury requirement of section 1964(c).[79] The

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[72] *Id.* Using this new two-pronged test, the court reasoned that the plaintiff's injury resulted from the predicate offenses and not from a "pattern" of racketeering activity. Since the plaintiff's claim failed to state a distinct RICO injury, the court upheld the district court's dismissal of the claim. *Id.* at 518.

Again, Judge Cardamone dissented from the opinion, reasoning that the majority's decision even allowed convicted mafia defendants to escape the civil provisions of RICO. *Id.* at 522 (Cardamone, J., dissenting). The majority compensated only indirect victims and not those victims directly harmed by the predicate offenses. *Id.* The dissent stated that the majority amended RICO without authority, and the restrictions on the civil provisions were especially inappropriate since the criminal provisions were unaffected. *Id.* at 524.

[73] 741 F.2d 525 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 3550 (1985).

[74] *Id.* at 525. Plaintiffs alleged that defendants failed to protect their interests as general partners and misrepresented opportunities available from the sale. *Id.* at 526. Defendants' alleged use of mail and wire fraud to perpetrate the scheme caused RICO to apply. *Id.*

[75] Although compelled to follow precedent, the opinion published in *Furman* served as a record of the panel's disagreement with *Sedima* and *Bankers Trust*. *Id.* at 525. The opinion also voiced disagreement with the Second Circuit's denial of en banc consideration of the three cases. *Id.* (Cardamone, J., Pratt, J., and Winter, J., dissenting).

[76] *Haroco*, 747 F.2d at 390, 398. Although RICO applied beyond the original focus of the Act, Congress chose the terms in order to be assured of the Act's effectiveness. *Id.* at 392.

[77] *Id.* at 389. Most courts even failed to define the additional racketeering injury they required. *Id.; see supra* note 46 and accompanying text.

[78] *Haroco*, 747 F.2d at 390, 399. The court decided it could not limit RICO without affecting the policy choices made by Congress when it drafted the Act. *Id.* at 399. The court countered the argument that treble damages encouraged spurious claims by pointing out that valid claims might be settled more equitably. *Id.* at 399 n.16. Either way, the choice of treble damages was made by Congress. *Id.* The court also rejected the *Sedima* court's contention that the language of the statute was ambiguous. *Id.* at 398.

[79] *Id.* at 398. The court held that *Schacht* was controlling in the instant case and rejected the Second Circuit's narrow reading of RICO. *Id.* at 389. The Seventh Circuit noted that it chose not to hold a rehearing en banc on the question of conflict with the

court held that a competitive injury requirement unreasonably limited an action under RICO;[80] likewise, an indirect injury requirement contravened the purpose of the statute.[81] The court continued its analysis stating that since a racketeering injury was not required by the statute,[82] then a direct, noncompetitive injury resulting from the underlying predicate acts sufficed to give rise to a cause of action[83] if the other requisite elements of an action under section 1964(c) were present.[84] The court concluded that the organized crime nexus requirement had been rejected for both criminal and civil actions under RICO;[85] therefore, the injury need not result from organized crime.[86] Additionally, the court found that requiring the injury to be the "but-for" result of each element of the section 1962 violation severely restrained the application of the statute in opposition to its purposes.[87] Therefore, an injury to business or property need only be the consequence of the individual acts within the pattern of racketeering or the sum of those acts.[88] The court held, however, that since the language of section 1964(c) says "by reason of a RICO violation,"[89] then a proximate cause relationship must be established between the prohibited conduct and the injury.[90]

Second Circuit's holdings in *Sedima, Bankers Trust* and *Furman. Id.* at 384 n.(note of court).

[80] *Id.* at 391.

[81] *Id.* at 392. Suits to recover "contributions" to the racketeers' profits would be impossible pursuant to an indirect injury requirement. *Id.*

[82] *Id.* at 398.

[83] *Id.* at 391-92, 398.

[84] *Id.* at 386. The injury alleged must be to business or property and must be "by reason of a violation of section 1962." *Haroco*, 747 F.2d at 387. In the instant case, the plaintiffs pursued the claim by alleging a violation of § 1962(c). *Haroco*, 747 F.2d at 387; *see supra* note 8.

[85] *Haroco*, 747 F.2d at 391. The court noted that *Sedima* attempted to reinstate the organized crime requirement by requiring that the injury be the type Congress intended RICO to prevent. *Id.* at 394. Also, the court reasoned that the white collar crime to which RICO in many cases applied, was a serious problem in itself. *Id.* at 395 n.14 (quoting Furman v. Cirrito, 741 F.2d 524, 529 (2d Cir. 1984)).

[86] *Haroco*, 747 F.2d at 395. Although the purpose of RICO was to combat organized crime, its application has never been limited to this activity. *Id.*

[87] *Id.* at 396. The court reasoned that it could not limit RICO without affecting the policy choices made by Congress when it drafted the Act. *Id.* at 399.

[88] *Id.* at 398.

[89] *See supra* note 4.

[90] *Haroco*, 747 F.2d at 391. The court noted that although the causation requirement was not particularly "subtle, elegant or imaginative," it was a direct product of the "by reason of" clause, which was the intention of Congress. Congress did not intend to make a RICO violator liable for injuries stemming from activities not proscribed by §

The United States Supreme Court recently addressed for the first time the injury requirement necessary under the section 1964(c) civil provision of RICO.[91] The Court, affirming the Seventh Circuit's ruling in *Haroco*, held that the injuries resulting from the predicate offenses alone are enough to state a claim under section 1964(c).[92] The Court also did not accept the respondent's contention, first raised on *certiorari*, that the enterprise must be conducted through the pattern of racketeering activity.[93] The Supreme Court stated that this restriction was as nebulous as the injury requirements it had repudiated in *Sedima*.[94]

In the reversal of *Sedima*, the racketeering injury requirement set forth by various courts was rejected by the Supreme Court as vague and amorphous.[95] The Court described the racketeering injury requirement as being "unhelpfully tautological"[96] and stated that the language of the RICO statute did not support such an additional requirement.[97] The plaintiff has a claim under section 1964(c) if the defendant engages in a pattern of racketeering activity as prohibited by sections 1962(a)-(c), and injury to business or property results.[98] The Court held that RICO was to be read broadly.[99] The Court finally stated that

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1962. *Id.*

[91] *See* American Nat'l Bank & Trust Co. v. Haroco, Inc., 105 S. Ct. 3291 (1985); Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275 (1985). These two cases were decided by the Supreme Court on the same day, and both deal with the injury requirement needed to state a claim under § 1964(c) of RICO. *Haroco*, 105 S. Ct. at 3291.

[92] *Haroco*, 105 S. Ct. at 3292. The Court did not require that the plaintiff be damaged by reason of defendant's violation of § 1962 through the prescribed predicate offenses. *Id.*

[93] *Id.*

[94] *Id.*

[95] Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3284-85. The Supreme Court also reversed the requirement of a prior criminal conviction espoused by the Second Circuit. *Id.* at 3284. The Court found nothing in the history, language, or policy considerations of the statute to warrant a criminal conviction prior to pursuing a claim under § 1964(c) of RICO. *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 3285.

[99] *Id.* at 3286. The broad reading of RICO results not only from the statute's expansive language and overall approach, but also from Congress' directive that RICO "be liberally construed to effectuate its remedial purposes." *Id.*; *see supra* note 22. The narrow readings proposed would effectively eliminate the private civil provision of RICO from the statute. *Id.* The Court further stated that RICO's application to situations unanticipated by Congress demonstrated breadth rather than ambiguity. *Sedima*, 105 S. Ct. at 3287 (quoting *Haroco*, 747 F.2d at 398).

In a dissenting opinion, Justice Marshall stated that Congress would not have en-

it was for Congress, and not for the courts, to limit the RICO statute.[100]

The Supreme Court recognizes that the statute as written does not convert every common law transgression into a federal offense because the requisite elements of a RICO violation must be established.[101] The RICO elements sufficiently limit the statute without the imposition of strained and convoluted injury requirements.[102] Restrictions such as those imposed by the Second Circuit would specifically allow criminals at whom Congress aimed the statute to escape punishment.[103] However, the Supreme Court seems willing to look toward a more meaningful definition of "pattern" within the statute in an effort to limit the broad application of RICO.[104] The reinterpretation of the pattern requirement should be the next important issue in litigation of RICO claims now that the racketeering injury requirement has been firmly discarded.

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acted a statutory provision which had the effect of displacing existing federal remedies and federalizing state common law without more comment and attention. *Sedima*, 105 S. Ct. at 3296 (Marshall, J., dissenting). The dissent relied on the "by reason of § 1962" language in § 1964(c) and formulated a definition of RICO injury. *Id.* at 3296-97. The dissent defined RICO injury as "injury to their competitive, investment, or other business interests resulting from the defendant's conduct of a business or a market, through a pattern of racketeering activity." *Id.* at 3302.

Justice Powell also dissented and voiced his fear that the courts would be compelled to read RICO broadly due to the majority's opinion. *Sedima*, 105 S. Ct. at 3289-90 (Powell, J., dissenting). Justice Powell noted that former United States Supreme Court decisions providing for a broad interpretation of RICO dealt with the criminal provision of the statute. *Id.* at 3290. *See generally* Russello v. United States, 464 U.S. 16 (1983)(RICO to be read broadly); United States v. Turkette, 452 U.S. 576 (1981)(RICO to be liberally construed).

[100] *Sedima*, 105 S. Ct. at 3287.

[101] *See supra* notes 81, 90 and accompanying text and text accompanying note 89.

[102] *See supra* notes 76-79, 84 and accompanying text.

[103] *Id.*

[104] *See Sedima*, 105 S. Ct. at 3286-87; *see also id.* at 3285 n.14 (Court's analysis of why two acts of racketeering activity may not constitute a pattern).

Corporations—Derivative Action—Demand Futility is Achieved by the Creation of a Reasonable Doubt of Directorial Disinterest Through Allegations of Factual Particularity

Plaintiff[1] brought a stockholder's derivative action in the Court of Chancery of Delaware seeking cancellation of a directorial employment contract.[2] Defendants moved to dismiss pursuant to Delaware Chancery Court Rule 23.1,[3] asserting that the plaintiff made no demand[4] on

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[1] Plaintiff was Harry Lewis, a stockholder of the defendant corporation, Meyers Parking System, Inc. Aronson v. Lewis, 473 A.2d 805, 808 (Del. 1984). Meyers was a wholly-owned subsidiary of Prudential Building Maintenance Corporation (Prudential) before the parent company spun off its shares of Meyers stock to Prudential stockholders. *Id.* Prior to distribution of the shares, the chief executive officer of Prudential was Leo Fink. Lewis v. Aronson, 466 A.2d 375, 379 (Del. Ch. 1983). Meyers' ten directors, including Fink, were also named as defendants. *Aronson*, 473 A.2d at 808.

[2] *Aronson*, 473 A.2d at 808. The challenged transaction was a favorable employment agreement between Meyers and one of its directors, Leo Fink. *Id.* Fink owned 47% of outstanding Meyers stock and was 75 years old when the agreement was approved on January 1, 1981. *Id.* at 808-09. The five-year contract provided for indefinite automatic renewals, an annual salary of $150,000, and a five percent bonus of Meyers' pre-tax profits over $2,400,000. *Id.* at 808. At termination, Fink was to be retained as consultant at a fee of $150,000 annually for the first three years, $125,000 for the next three years, and $100,000 thereafter for life; compensation was to remain unaffected by inability of performance. *Id.* at 808-09. Plaintiff's complaint charged that these transactions were of an invalid corporate purpose, that the greatly excessive salaries made the agreement a waste of the company's assets, that Fink performed minimal services, if any, and that Fink's advanced age lessened corporate expectations regarding his performance as an employee. *Id.* at 809.

[3] *Id.* Chancery Rule 23.1, similar to Rule 23.1 of the Federal Rules of Civil Procedure, provides in pertinent part:

> In a derivative action brought by 1 or more shareholders or members to enforce a right of a corporation . . . , the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall . . . allege *with particularity* the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the *reasons for his failure to obtain the action or for not making the effort.*

Del. Ch. Ct. R. 23.1 (emphasis added).

[4] *See* H. Henn & J. Alexander, Laws of Corporations and Other Business Enterprises § 364, at 1068 (3d ed. 1983). As a prerequisite to a shareholder derivative suit, a plaintiff must have first made a demand on the board of directors that the corporation take the obligatory steps to enforce the cause of action. *Id.* § 365, at 1069; *see also* Fed. R. Civ. P. 23.1 (federal statutory authorization of demand requirement). Such demand has allowed the corporation's management to analyze the merits of the shareholder's

the board of directors prior to suit and that the plaintiff failed to allege particular facts that would prove that such demand was futile.[5] The trial court denied the motion, finding that the plaintiff's allegations demonstrated a "reasonable inference" that the business judgment rule[6] would be inapplicable and that demand was therefore excused.[7] On interlocutory appeal,[8] the Supreme Court of Delaware, *held*, re-

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claim of corporate wrongdoing and to decide whether the claim, if justifiable, could be resolved with litigation. 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 5963 (rev. perm. ed. 1980). By allowing the directors the right to manage corporate affairs, the corporation itself has had the opportunity to take control of a suit brought on its behalf. Brody v. Chemical Bank, 517 F.2d 932, 934 (2d Cir. 1975). Among the practicalities of demand have been the directors' familiarity with the questioned transaction, the directors' fiduciary obligation to best serve the corporate interest, and the abatement of strike suits. *See* Note, *The Demand and Standing Requirements in Stockholder Derivative Actions*, 44 U. CHI. L. REV. 168, 171-72 (1976)(purpose and practical advantages of the demand on directors requirement discussed) [hereinafter cited as Note, *The Demand and Standing Requirements*]. In order for plaintiff to pursue litigation on his own, the demand must have been met with a refusal from the corporation. Ainscow v. Sanitary Co. of Am., 21 Del. Ch. 35, 180 A. 614, 615 (1934). Even if the plaintiff has fulfilled the demand on directors requirement, he has been required to make demand on the corporate shareholders as well to establish standing to sue. *See generally* Note, *Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit*, 73 HARV. L. REV. 746, 749-52, 754-59, 760-62 (general discussion of demand on shareholders requirement and excuses for failure to make such demand); Note, *The Demand and Standing Requirements*, *supra*, 193-203 (general discussion of standing requirements and situations where shareholders have had standing to sue).

[5] *Aronson*, 473 A.2d at 809. Plaintiff's complaint asserted that any attempt at demand would be futile for the following reasons: all of the director-defendants were personally liable for the wrongful transactions due to their participation, express approval or acquiescence; all of the director-defendants were under the domination and control of defendant Fink, who selected each director; and due to the directors' status as defendants, board hostility would prevent effective prosecution because the present directors would not sue themselves. *Id.*

[6] The business judgment rule is a presumption that the directors have acted in good faith with the best interests of the company and on an informed basis when making a business decision. Kaplan v. Centex Corp., 284 A.2d 119, 124 (Del. Ch. 1971). It is a potential defense to derivative actions. Lewis v. Aronson, 466 A.2d 375, 381 (Del. Ch. 1983); *see infra* notes 27, 28 and accompanying text.

[7] Lewis v. Aronson, 466 A.2d 375, 381 (Del. Ch. 1983). In finding that such allegations were sufficient, the trial court applied the "reasonable inference" test of Bergstein v. Texas Int'l Co., 453 A.2d 467 (Del. Ch. 1982). In order to overcome the presumption of the business judgment rule, the stockholder must plead facts sufficient to permit a reasonable inference that the directors' actions were unprotected. Haber v. Bell, 465 A.2d 353, 357 (Del. Ch. 1983).

[8] *Aronson*, 473 A.2d at 807. Certification of interlocutory appeal from the Court of Chancery was made pursuant to Delaware Supreme Court Rule 42(c).

versed and remanded.[9] Stockholder demand on the board of directors will not be excused unless particular facts are alleged that create a reasonable doubt that the action of the directors is not in accordance with the business judgment rule. *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

The requirement that a stockholder make demand on a corporation's board of directors as a condition precedent to a derivative action[10] had its genesis in the English courts of equity.[11] The prerequisite was first established in the United States in the landmark decision of *Hawes v. Oakland*,[12] where the United States Supreme Court held that a minority stockholder[13] was required to plead specific facts showing that he had made demand upon the directors or to demonstrate that he should not be required to make a demand.[14] The Court reasoned that since the plaintiff sued on a right belonging to the corporation, he must first have established in his complaint that all intracorporate

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[9] *Aronson*, 473 A.2d at 818.

[10] *See* H. HENN & J. ALEXANDER, *supra* note 4, § 358, at 1035. The stockholder derivative action developed in equity to allow shareholders to sue for the corporation where the officers refused to assert a corporate claim. *Id.*; *see* Dodge v. Woolsey, 59 U.S. (18 How.) 331, 341 (1856)(leading American case concerning origination of derivative action). The requirements for a derivative action are essentially stated in Rule 23.1 of the Federal Rules of Civil Procedure. *See supra* note 3. Rule 23.1, in contrast to the other federal rules, has retained common-law fact pleading regarding the claim. *See* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.1.01 (2d ed. 1982)(Rule 23.1 requires particularity). *But cf.* FED. R. CIV. P. 8(a)(Rule 8(a) requires short and plain statement). The particularity prerequisite has not made Rule 23.1 a technical rule of pleading, but one of substantive right. Bartlett v. New York, N.H. & H.R.R., 221 Mass. 530, 109 N.E. 452, 456 (1915). The derivative action has been described as having two phases—one is the equivalent of a suit by the shareholder compelling the corporation to litigate, and the other is a suit by the corporation against offenders, asserted on behalf of the entity by the stockholder. *See generally* Cantor v. Sachs, 18 Del. Ch. 359, 162 A. 73, 76 (1932)(two-fold nature of action).

[11] H. HENN & J. ALEXANDER, *supra* note 4, § 364, at 1068. *See, e.g.*, Foss v. Harbottle, 67 Eng. Rep. 189, 2 Hare 461 (Ch. 1843)(leading English case concerning the demand requirement).

[12] 104 U.S. 450 (1882).

[13] *Id.* at 451. The shareholder of a water company, Hawes, brought his bill in equity against the corporation and the city of Oakland, alleging that the entity was furnishing water free of charge to the city. *Id.* The complaint stated that the directors disregarded his request for relief and continued to provide the gratuity. *Id.*

[14] *Id.* at 461. Regarding the degree of specificity, the Court stated that "efforts to induce such action as complainant desires on the part of the directors . . . and the cause of failure in these efforts should be stated with particularity. . . ." *Id.* The Court, elaborating on the degree of specificity, stated in City of Detroit v. Dean, 106 U.S. 537, 542 (1882), that the plaintiff must show a clear breach of duty on the directors' part in refusing to act, amounting to extremely culpable conduct.

remedies had been exhausted.[15] In 1882, the Supreme Court adopted Equity Rule 94[16] as a codification of the holding in *Hawes*.[17] In *Delaware & Hudson Co. v. Albany & Susquehanna Railroad*,[18] the United States Supreme Court recognized circumstances in which the demand on directors requirement would be "presumptively futile"[19] and therefore excused.[20] The *Delaware & Hudson* decision[21] created an excep-

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[15] *Hawes*, 104 U.S. at 460-61; *accord* Bartlett v. New York, N.H. & H.R.R., 221 Mass. 530, 109 N.E. 452, 453 (1915)(shareholder required to exhaust intracorporate remedies); *see also* Sohland v. Baker, 15 Del. Ch. 431, 141 A. 277, 282 (1927)(Delaware Supreme Court cited *Hawes* with approval).

[16] 104 U.S. ix-x (1882). Equity Rule 94, which later became Equity Rule 27, was adopted in the Federal Rules of Civil Procedure as Rule 23(b). C. WRIGHT, THE LAW OF FEDERAL COURTS § 73, at 488 (4th ed. 1983). Rule 23.1, promulgated in 1966, substantially reaffirmed Rule 23(b); therefore pre-1966 decisions remain valid precedent. *Id.*

[17] *See* City of Quincy v. Steel, 120 U.S. 241, 245 (1887)(Court stated that *Hawes* decision was codified by Equity Rule 94).

[18] 213 U.S. 435 (1909).

[19] *Id.* at 452; *see* Herpich v. Wallace, 430 F.2d 792, 818 (5th Cir. 1970)(synonymous language—"unavailing"); HFG Co. v. Pioneer Pub. Co., 7 F.R.D. 654, 655 (D. Ill.)(synonymous language—demand "useless"), *rev'd on other grounds*, 162 F.2d 536 (7th Cir. 1947); Dana v. Morgan, 219 F. 313, 315 (D.N.Y. 1914)(synonymous language—"idle ceremony"), *aff'd on other grounds*, 232 F. 85 (2d Cir. 1916).

[20] *Delaware & H. Co.*, 213 U.S. at 452. Ineffectuality of demand has usually been found in cases where the directors were the alleged wrongdoers. *See, e.g.*, Jones v. Equitable Life Assurance Soc'y, 409 F. Supp. 370, 372 (S.D.N.Y. 1975)(allegation of trustee involvement); Brooks v. American Export Indus., 68 F.R.D. 506, 508 (S.D.N.Y. 1975)(allegation that directors were involved in revolving credit agreement); Kusner v. First Pa. Corp., 395 F. Supp. 276, 279 (E.D. Pa. 1975)(allegation that directors defrauded corporation), *rev'd on other grounds*, 531 F.2d 1234 (1976), *enforcing* 74 F.R.D. 606 (1977).

Demand futility has also been allowed where the directors were under the control of the alleged wrongdoer. *See, e.g.*, Doctor v. Harrington, 196 U.S. 579 (1905)(allegation that defendant owned majority of stock and controlled directors); Meltzer v. Atlantic Research Corp., 330 F.2d 946, 948 (4th Cir.)(allegation that defendants dominated board), *cert. denied sub. nom.* Scurlock v. Meltzer, 379 U.S. 841 (1964); Akin v. Mackie, 203 Tenn. 105, 310 S.W.2d 164, 166 (1958)(same).

Demand has been excused in certain cases where the directors approved the wrongful transaction. *See, e.g.*, American Life Ins. Co. v. Powell, 262 Ala. 560, 80 So. 2d 487, 489 (1954)(allegation of demand futility due to directorial approval); Barr v. Wackman, 36 N.Y.2d 371, 329 N.E.2d 180, 185 (1975)(same). *See also* Clark v. Lomas & Nettleton Fin. Corp., 625 F.2d 49, 51 (5th Cir. 1980)(allegation of various conflicts of interest), *cert. denied*, 450 U.S. 1029 (1981); Nussbacher v. Continental Ill. Nat'l Bank & Trust Co., 518 F.2d 873, 875 (7th Cir. 1975)(clear directorial opposition), *cert. denied*, 424 U.S. 928 (1976); *In re* Pittsburgh & L.E.R.R. Sec., 392 F. Supp. 492, 493-94 (E.D. Pa. 1975)(directors decided against proposed demands).

[21] The plaintiff-stockholder attempted to obtain an accounting for debts owed to Delaware & Hudson from defendant railroad. *Delaware & H. Co.*, 213 U.S. at 442. A majority of the railroad's board of directors simultaneously served as officers or directors of Delaware & Hudson, which consequently treated the claim as nonexistent. *Id.* at 443.

tion to the demand requirement that later resulted in a modification of the old rule.[22]

Over the next several decades, courts determined demand futility by considering each case upon its particular facts.[23] The courts advocated consideration of the entire complaint[24] and examination of the facts with a pragmatic attitude.[25] Since the test of sufficiency of allegations was now a question for the court to decide, excuse of the demand

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The Court, noting that the company responsible for collecting the debts was under the control of the company that denied the indebtedness, found the plaintiff was excused from his Rule 94 burden by his establishment of a clear and unmistakable incompatibility between the interests of the directors and the corporation. *Id.* at 447, 451.

[22] *Id.* at 447. In 1912, the Supreme Court enacted Equity Rule 27, 226 U.S. app. 8 (1912), which modified Rule 94 by adding the phrase "or the reasons for not making such effort," thereby requiring excuses for demand futility to be alleged with particularity. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1821 (1972). The change for the rule was necessitated by the *Delaware & H. Co.* decision. Note, *The Demand and Standing Requirements, supra* note 4, at 171 n.23. *See* Cohen v. Indus. Fin. Corp., 44 F. Supp. 491, 494 (S.D.N.Y. 1942)(rule change may have been made in view of *Delaware & H. Co.* opinion).

[23] *See, e.g.*, Dana v. Morgan, 219 F. 313, 315 (D.N.Y. 1914)(matter of judicial discretion), *aff'd on other grounds*, 232 F. 85 (2d Cir. 1916). An excellent exemplary case of this period is Cohen v. Indus. Fin. Corp., 44 F. Supp. 491 (S.D.N.Y. 1942). Cohen, a stockholder of Industrial Acceptance (IAC), filed a derivative action against Industrial Finance (IFC) based on an alleged conspiracy. *Id.* at 492. The corporate wrongdoing alleged was an agreement between IFC and IAC, whereby IAC granted IFC a revolving line of credit without security and set the line of credit at three million dollars. IAC assets were then allegedly invested as a holding company in another corporation's stock, the result of which left IAC virtually barren. Cohen made no demand, alleging that at least thirteen of the seventeen IAC directors were also directors of IFC; that the president, vice-president, and secretary were the same officers for IFC and IAC; and that IFC owned 85% to 90% of the IAC voting stock. *Id.* at 493. The *Cohen* court reasoned that any haphazard construction of the rule requiring demand would disable those equitable considerations that led to its enactment. *Id.* at 494; *see* Berg v. Cincinnati, N. & C.R.R., 56 F. Supp. 842, 845 (E.D. Ky. 1944)(case to be construed according to equitable considerations). The court acknowledged that excuse of the demand requirement was "a question for the court," and found the requisite particularity in Cohen's complaint. *Cohen*, 44 F. Supp. at 495.

[24] *See, e.g.*, Cohen v. Indus. Fin. Corp., 44 F. Supp. 491, 495 (S.D.N.Y. 1942). As a general rule, sufficiency of allegations has been based solely on the complaint. DeHaas v. Empire Petroleum Co., 286 F. Supp. 809, 813 (D. Colo. 1968), *aff'd*, 435 F.2d 1223 (10th Cir. 1970); *cf.* Dopp v. American Elec. Laboratories, 55 F.R.D. 151, 153 n.3 (S.D.N.Y. 1972)(voluminous affidavit not considered). *But see* DePinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 830 (9th Cir. 1963)(testimony and other evidence allowed where veracity of complaint was called into question), *cert. denied*, 376 U.S. 950 (1964).

[25] *See* Cohen v. Indus. Fin. Corp., 44 F. Supp. 491, 494 (S.D.N.Y. 1942)(court noted that directors placed on the board by majority stockholder after suit had been filed would be presumed biased).

requirement was subjected to inconsistent analyses.[26]

In addition to the lack of uniformity resulting from these decisions *ad hoc*, plaintiff-stockholders found it difficult to show demand futility due to directorial assertion of the business judgment rule.[27] The business judgment rule, which acts as a bar to the derivative action, has been closely connected to the demand on directors requirement.[28]

In 1973, the First Circuit Court of Appeals made mention of this connection in *In re Kauffman Mutual Fund Actions*.[29] The plaintiff-shareholder filed a derivative suit against certain mutual funds,[30] their external investment advisors, and directors affiliated with both the funds and investment counselors.[31] The gist of the complaint was that those fund directors who were also members of the boards of directors of the investment advisory firms conspired with the funds and advisors in violation of federal antitrust laws.[32] The plaintiff asserted demand would be futile because the affiliated directors, although a minority of

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[28] 3B J. MOORE & J. KENNEDY, *supra* note 10, ¶ 23.1.19. Interpretation of the demand requirement has varied considerably according to Professor Moore, who has acknowledged the lack of uniformity among federal courts and has candidly conceded that courts have generally used their individual "sound discretion" in determining the necessity for demand. The inconsistencies have been most obvious in the federal court system, ranging from the strict enforcement of Rule 23.1 by the First Circuit to the liberal application permitted by the Fifth Circuit. Note, *The Demand and Standing Requirements*, *supra* note 4, at 170. *Compare In re* Kauffman Mut. Funds Actions, 479 F.2d 257, 263 (1st Cir.)(demand on directors was stated to be exceptional rule of pleading), *cert. denied*, 414 U.S. 857 (1973), *with* Liboff v. Wolfson, 437 F.2d 121, 122 (5th Cir. 1971)(court interpreted demand requirement as coming under flexible standards of modern notice pleading) *and* Herpich v. Wallace, 430 F.2d 792, 817-18 (5th Cir. 1970)(complaint judged by short and plain statement of FED. R. CIV. P. 8 (a)). Other jurisdictional interpretations of the demand requirement have also reached incongruous results. *See, e.g.*, DeHaas v. Empire Petroleum Co., 435 F.2d 1223, 1228 (10th Cir. 1970)(court expressed lenient attitude toward excusal of demand); Lewis v. Anselmi, 564 F. Supp. 768, 773 (S.D.N.Y. 1982)(court acknowledged vigorous enforcement of Rule 23.1).

[27] The doctrine that prevents the courts from interfering with management decisions acted on in good faith and in the best interests of the corporation is called the business judgment rule, 3A W. FLETCHER, *supra* note 4, § 1039; *see supra* note 6. *See generally* Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 97-100, 111-21 (1979)(discussion of business judgment rule including origin and current application).

[28] Cramer v. General Tel. & Elecs. Corp., 582 F.2d 259, 274 (3d Cir. 1978).

[29] 479 F.2d 257 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973).

[30] *Kauffman*, 479 F.2d at 261. Plaintiff Kauffman alleged antitrust and Investment Company Act causes of action. *Id.* The four firms were the Dreyfus Funds, Inc., the Manhattan Fund, Inc., the Fidelity Trend Fund, Inc., and the Putnam Growth Fund. *Id.*

[31] *Id.*

[32] *Id.*

the board of each fund,[33] dominated and controlled the unaffiliated directors of the mutual funds who constituted a majority.[34] The complaint further averred that the majority participated in the corporate wrongdoing[35] by approving the allegedly injurious contracts.[36] The *Kauffman* court held that an unsupported statement of domination and control, in the absence of factual substance,[37] was insufficient to establish the requisite particularity for Rule 23.1.[38] The plaintiff was required to allege detailed facts showing a clear connection between the unaffiliated majority[39] and the affiliated and allegedly wrongdoing minority.[40] The court concluded that the mere allegation of the defendants' acquiescence in the alleged conspiracy was not a particularity from which a conclusion of control might follow.[41] The *Kauffman* court also found that the plaintiff had failed to allege that the unaffiliated directors who had approved the agreements were still on the boards when the action was filed.[42] Such failure was fatal to the plaintiff's attempt to show that demand would be unavailing as to a majority of the

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[33] *Id.* at 262. The affidavits showed that five of nine Putnam trustees, five of seven Dreyfus directors, five of eight Fidelity directors, and three of five Manhattan directors were unaffiliated. *Id.* n.3.

[34] *Id.* at 262.

[35] *Id.* The plaintiff's complaint alleged that all of the defendants "acquiesced, encouraged, cooperated, and assisted in the effectuation and maintenance" of the conspiracy. *Id.* at 264.

[36] *Id.* at 262.

[37] *Id.* at 264. The court cited Cathedral Estates v. Taft Realty Corp., 228 F.2d 85, 85, 88 (2d Cir. 1955), as an example of factual support where the plaintiff alleged that the defendants controlled a majority of the company stock. Stock ownership alone is not sufficient proof of domination or control, at least when it amounts to less than a majority. Elfenbein v. Gulf & W. Indus., 590 F.2d 445, 451 (2d Cir. 1978); *accord* Kaplan v. Centex Corp., 284 A.2d 119, 122-23 (Del. Ch. 1971)(same). *But see* Abbe v. Goss, 411 F. Supp. 923, 924-25 (S.D.N.Y. 1975)(demand on directors excused where three defendants owned 44% of outstanding shares).

[38] *Kauffman*, 479 F.2d at 264; *see* Grossman v. Johnson, 674 F.2d 115, 123-24 (1st Cir. 1982)(particular allegations and specific facts are required to excuse demand for domination or control); Vernars v. Young, 539 F.2d 966, 968 (3d Cir. 1976)(same).

[39] *Kauffman*, 479 F.2d at 264. Kauffman conceded in his complaint that the interested directors were in the minority. *Id.* In dicta, the court stated that had there been a majority of affiliated directors, the particularity requirement might have been satisfied as to the excuse of control. *Id; accord* Levitt v. Johnson, 334 F.2d 815, 817 (1st Cir. 1964)(allegation that self-interested directors made up majority was adequate to excuse demand), *cert. denied*, 379 U.S. 961 (1965).

[40] *Kauffman*, 479 F.2d at 264. *Cf.* Baffino v. Bradford, 57 F.R.D. 79, 80 (D. Minn. 1972)(court stated complaint must do more than make simple allegations of futility in order for demand to be excused).

[41] *Kauffman*, 479 F.2d at 264.

[42] *Id.*

board.[43] Finally, the court stated that even if the affiliated minority had gone unchanged on the boards and this had been properly alleged, the directorial approval of the contracts would not be adequate to excuse demand absent any evidence of self-interest or bias by the unaffiliated majority.[44] The rationale behind the *Kauffman* findings dealt with the distinction between a transaction unrelated to a company's interest[45] and one that may have been thought to serve a legitimate corporate purpose.[46] The court reasoned that in the latter situation the director who may have made an error in business judgment should have the opportunity to correct that error; otherwise, a minority stockholder could subvert Rule 23.1[47] by simply alleging mistaken

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[43] *Id.* In a concurring opinion, Chief Judge Coffin agreed with the plurality that this defect would not entitle the plaintiff to assert demand futility, but emphasized that in the absence of this flaw he would have excused demand. *Id.* at 267 (Coffin, C.J., concurring).

[44] *Id.* at 265. Although the courts are split on this point, *Kauffman* is recognized as the majority view. Lewis v. Curtis, 671 F.2d 779, 785 (3d Cir. 1982). Other courts have taken the view expressed by Barr v. Wackman, 36 N.Y.2d 371, 329 N.E.2d 180, 188 (1975). Note, *The Demand and Standing Requirements, supra* note 4, at 176-77; *see infra* notes 49-62 and accompanying text; *see also* Greenspun v. Del. E. Webb Corp., 634 F.2d 1204, 1210 (9th Cir. 1980)(mere approval of corporate action will not excuse demand); Brooks v. American Export Indus., 68 F.R.D. 506, 511 (S.D.N.Y. 1975)(same, citing *Kauffman*). *But see* Papilsky v. Berndt, 59 F.R.D. 95, 97 (S.D.N.Y. 1973)(demand futile on basis of mere directorial approval of challenged acts); *see Kauffman*, 479 F.2d at 266 n.6 (*Kauffman* court noted that authorities cited by *Papilsky* did not support decision).

[45] *Kauffman*, 479 F.2d at 265. The court gave examples of agreements solely for the interested directors' benefits, such as sham loans, and stated that approval by the disinterested directors would be inexplicable on its face. *Id.* Generally, courts have not required demand when a majority of the directors have engaged in fraud or self-dealing. *See* Craftsman Fin. & Mortgage Co. v. Brown, 64 F. Supp. 168, 175 (S.D.N.Y. 1945)(allegation that over 50% of defendants were involved in self-dealing made demand useless). *Cf.* Caldwell v. Eubanks, 326 Mo. 185, 30 S.W.2d 976, 979 (1930)(since self-dealing directors were in minority, plaintiff was required to make demand). *But cf.* Meltzer v. Atlantic Research Corp., 330 F.2d 946, 949 (4th Cir.)(demand was excused where minority of directors were accused of self-dealing), *cert. denied sub. nom.* Scurlock v. Meltzer, 379 U.S. 841 (1964).

[46] *Kauffman*, 479 F.2d at 265. The legitimate corporate purpose mentioned by the court is synonymous with those actions covered by the business judgment rule. *See supra* notes 6, 27, 28 and accompanying text.

[47] *Kauffman*, 479 F.2d at 265. The court cautioned against a possible dilution of Rule 23.1 which would allow the stockholder to try his case on the merits or establish a case through the discovery process. *Id.* at 263, 265. The plurality also leveled criticism at the Tenth Circuit for its statement in DeHaas v. Empire Petroleum Co., 435 F.2d 1223, 1228, that "[c]ourts are generally lenient in excusing demand." *Id.* at 267.

judgment.[48]

The New York Court of Appeals considered a case similar to *Kauffman* two years later in *Barr v. Wackman.*[49] Plaintiff Barr, a shareholder of Talcott National Corporation, filed a derivative action alleging that defendant Gulf & Western Industries[50] and Talcott entered into a "plan and scheme"[51] regarding a potential merger.[52] As in *Kauffman*, the plaintiff's complaint asserted that an affiliated minority of the Talcott directors dominated and controlled the corporate board,[53] and additionally alleged that the unaffiliated majority had breached their fiduciary duties by their approval of the questioned acts.[54] Defendant directors' motion to dismiss for failure to make demand[55] was denied, and on appeal the defendants claimed that the challenged acts were of a corporate nature and at the most indicated mistaken business judgment.[56] The *Barr* court excused the pre-suit demand even though a majority of the board had not been charged with any specific wrongdoings.[57] The defendants argued that under *Kauffman* allegations of fraud or self-interest by unaffiliated directors were required for demand futility.[58] Although the argument was rejected by the court,[59] the statement was qualified by the court's postulate that specific facts must be pleaded.[60]

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[48] *Kauffman*, 479 F.2d at 265-66. As explained by the plurality, if the directors were guilty of erroneous business judgment, they would still be capable of carrying out their fiduciary duties after a demand had given them full knowledge of the corporate wrongdoing. *Id.* at 266-67. If the directors have accepted the shareholders' demand to litigate, the shareholders may still sue for breach of fiduciary duty if the directors have settled the suit in a disadvantageous manner. *See* Note, *The Demand and Standing Requirements, supra* note 4, at 176 n.60 (courts have allowed alternate remedy for shareholder).

[49] 36 N.Y.2d 371, 329 N.E.2d 180 (1975).

[50] *Id.* at 183. Also named as defendants were a Gulf & Western subsidiary and all of the Talcott directors. *Id.*

[51] *Id.* at 184. The plaintiff's complaint alleged that favorable new employment contracts, consultant fees, and excessive finder's fees would accrue to certain directors if the plan was successful. *Id.*

[52] *Id.*

[53] *See supra* note 34 and accompanying text.

[54] *Barr*, 329 N.E.2d at 185.

[55] *Id.*; *see* N.Y. BUS. CORP. LAW § 626(c)(McKinney 1963)(New York state law equivalent of Rule 23.1).

[56] *Barr*, 329 N.E.2d at 183.

[57] *Id.* at 188; *cf. Kauffman*, 479 F.2d at 265 (First Circuit held mere allegations of directorial approval were insufficient to excuse demand absent charges of self-interest or other bias by unaffiliated majority).

[58] *Barr*, 329 N.E.2d at 187.

[59] *Id.*; *see supra* note 44 and accompanying text.

[60] *Barr*, 329 N.E.2d at 186. The court also stated that a mere naming of a majority

In regard to the directors' business judgment argument, the court reasoned that an executive does not obtain judicial immunity by passively rubber-stamping the orders of operant managers.[61] The court then held that although there was no allegation of self-dealing by the disinterested majority of directors, the plaintiff had sufficiently complied with the particularity requirement to justify excuse of demand.[62]

Two years later, in *Heit v. Baird*,[63] the First Circuit reaffirmed its strict enforcement of the demand requirement, relying heavily on *Kauffman*.[64] Plaintiff Heit alleged that demand would be futile because all director-defendants had approved of the wrongful acts,[65] and also because the defendants would have been required to sue themselves.[66] The court dismissed the first contention under a *Kauffman* analysis[67] and disallowed the second allegation because its conclusory and unrealistic nature[68] would have obviated the need for demand.[69]

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of directors as defendants supported by conclusory allegations of wrongdoing would not suffice for demand excusal, *Id.* at 185. Such an allowance would ignore the statutory requirement of particularity. *Id.*; *see* Lewis v. Graves, 701 F.2d 245, 248-49 (2d Cir. 1983)(mere naming of directors as defendants fell short of excusing demand and would dilute Rule 23.1); Phillips v. Bradford, 62 F.R.D. 681, 688 (S.D.N.Y. 1974)(simple naming of disinterested directors did not create irrebuttable presumption that they would dismiss suit against other directors).

[61] *Barr*, 329 N.E.2d at 188. The court also asserted that the business judgment rule had not yet relieved the corporation of its traditional duties of due care and common sense judgment. *Id.*

[62] *Id.* The plaintiff's claim that the unaffiliated directors had disregarded Talcott's interests in favor of Gulf & Western, which would allegedly inure to the benefit of the affiliated minority, warranted the absence of demand when analyzed in conjunction with the series of transactions specifically pleaded. *Id.* at 186-87.

[63] 567 F.2d 1157 (1st Cir. 1977).

[64] *Id.* at 1159-62.

[65] *Id.* at 1159. Heit's derivative action alleged that three of seven directors received a large block of new stock for inadequate consideration for the purpose of preventing a possible takeover. The entire board of directors was named as defendants. *Id.*

[66] *Id.*

[67] *Id.* at 1161. Although Heit's complaint named more than a majority of the directors as defendants, the court determined that there must be a showing that a majority of the board was involved in a transaction completely unrelated to a corporate interest. *Id.* Since the plaintiff did not show the stock sale constituted an abuse of corporate privilege, demand was required. *Id.*; *see supra* notes 45-48 and accompanying text.

[68] *Heit*, 567 F.2d at 1161. Generally, an allegation that demand would be useless because the directors would have to institute an action against themselves has not been sufficient to excuse demand. Lewis v. Curtis, 671 F.2d 779, 785 (3d Cir. 1982); *see* Weiss v. Temporary Inv. Fund, 516 F. Supp. 665, 672-73 (bootstrap tactic was rejected); *see also Kauffman*, 479 F.2d at 264 (plaintiff's assertion that demand was futile because of board's hostility to claim was dismissed as bootstrap).

[69] *Heit*, 567 F.2d at 1162.

The *Heit* court also suggested that directorial participation that was not sufficient to excuse demand could still preclude the directors from asserting the business judgment rule as a defense for refusing to litigate.[70]

Three years later, the Second Circuit recognized that an assessment of the directors' interest must be made on two occasions: when no demand has been made and when the demand has been refused by the corporation.[71] The corporation's power to dismiss a derivative action was analyzed under Delaware law[72] by the Supreme Court of Delaware in *Zapata Corp. v. Maldonado.*[73] In *Zapata*, the plaintiff filed a derivative action alleging breaches of fiduciary duty by officers and directors of Zapata and made no demand on the board of directors.[74]

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[70] *Id.* n.6.

[71] Galef v. Alexander, 615 F.2d 51, 59 (2d Cir. 1980). The demand-excused/demand-refused bifurcation was made because the court recognized that a plaintiff attempting to comply with Rule 23.1 will allege either that the directors refused to act or that asking them to act would have been futile. *Id.* at 59. The question of whether the directors were interested in the transaction has arisen in each of these situations; therefore, the court must evaluate the directorial disinterest for demand-refusal as well as demand-excusal. *Id.* The Delaware Supreme Court made this same distinction one year later in Zapata Corp. v. Maldonado, 430 A.2d 779, 783-84 (Del. 1981). *See infra* note 78 and accompanying text. Other courts have also acknowledged the dichotomy and have attempted to formulate tests for each division. *See* Clark v. Lomas & Nettleton Fin. Corp., 625 F.2d 49, 54 n.5 (5th Cir. 1980)(test of disinterest for demand futility has been more vigorous than that for demand refusal), *cert. denied*, 450 U.S. 1029 (1981). *But cf.* Lewis v. Curtis, 671 F.2d 779, 785 (3d Cir. 1982)(court acknowledged difficulty of formulating different standards unless demand futility is strictly enforced).

Demand refusal has been allowed under the business judgment rule if a majority of disinterested directors decide in good faith that the lawsuit would not be in the best interests of the corporation. United Copper Sec. v. Amalgamated Copper Co., 244 U.S. 261, 264 (1917); *see* Ash v. Int'l Business Machs., 353 F.2d 491, 493 (3d Cir. 1965)(refusal must be made in good faith), *cert. denied*, 384 U.S. 927 (1966). *But cf.* Nussbacher v. Chase Manhattan Bank, 444 F. Supp. 973, 977 (S.D.N.Y. 1977)(fact that board opposes does not necessarily establish good faith).

[72] Delaware state law was interpreted because in Burks v. Lasker, 441 U.S. 471, 486 (1979), the Court held that a board of directors' ability to assert business judgment protection must be decided with reference to state law.

[73] 430 A.2d 779 (Del. 1981). The *Zapata* court attempted to define the limits of a corporation's right to preclude derivative suits under the business judgment rule. *Id.* at 781. Prior to *Zapata*, Delaware law had been inconsistently applied. *Compare* Abbey v. Control Data Corp., 603 F.2d 724, 730 (8th Cir. 1979)(federal court applying Delaware law held business judgment rule allowed board to terminate lawsuit), *cert. denied*, 444 U.S. 1017 (1980) *with* Maldonado v. Flynn, 413 A.2d 1251, 1257 (Del. Ch. 1980)(Delaware Court of Chancery held business judgment rule does not give board power to terminate).

[74] *Zapata*, 430 A.2d at 780. Plaintiff pleaded that demand should be excused be-

Two years later the board created an independent investigation committee to evaluate the claim,[75] which resulted in the committee's conclusions that the suit should be dismissed.[76] The defendants asserted their position was justified by the business judgment rule.[77] The *Zapata* court first distinguished between cases in which corporations refused to litigate and those in which demand futility was alleged.[78] The court then imposed a two-step test to determine whether or not the committee could dismiss a derivative action in a demand-excused case.[79] The test first required the corporation to prove good faith as to the committee, and then allowed the court to exercise its own reasonable business judgment to determine whether the action should have been dismissed.[80] *Zapata* emphasized that whether the case was demand-refused or demand-excused, the board still retained its corporate power to make decisions concerning litigation.[81] Left unanswered, how-

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cause all ten directors were named as defendants and allegedly participated in the challenged acts. *Id.*

[75] *Id.* at 781. Prior to the creation of the committee, four of the ten director-defendants had left the board. The remaining six directors appointed two new directors to the board. The investigation committee was made up solely of those two directors. *Id.*

[76] *Id.*

[77] *Id.* Delaware law authorizes that a corporation's decisions shall be made and managed by the board of directors. DEL. CODE ANN. tit. 8, § 141(a)(1983). The business judgment rule developed to give respect and recognition to the actions taken by the board. *Zapata*, 430 A.2d at 782. Delaware has been criticized for its lenient attitude concerning the business judgment rule. *See generally* Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 670-88 (1974)(Delaware's laissez-faire attitude toward management analyzed). Delaware judicial decisions have inflamed the issue by using extreme language in limiting the standards by which the business judgment rule will not be allowed to apply. *See, e.g.*, Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883, 888 (Del. 1970)("gross and palpable overreaching"); Warshaw v. Calhoun, 43 Del. Ch. 48, 221 A.2d 487, 492-93 (1966)("gross abuse of discretion"). *See generally* Cary, *supra*, at 680-81 (criticism of recent Delaware cases).

[78] *Zapata*, 430 A.2d at 783-84. The court stated that where demand was made on a board and refused, the business judgment rule should be applied to review the directorial refusal. *Id.* at 784. A proper exercise of business judgment would terminate the derivative action. In addition, where demand has been excused, the shareholder's right to prosecute may be terminated by the directors' business judgment. *Id.* The directors have had the statutory authority to allow an independent committee to decide whether the action should be dismissed or litigated. *Id.* at 786; *see* DEL. CODE ANN. tit. 8, § 141(c)(1983)(provision providing for board to delegate its managerial authority to committee); *see also* Galef v. Alexander, 615 F.2d 51, 59 (2d Cir. 1980)("demand-excused" and "demand-refused" distinction).

[79] *Zapata*, 430 A.2d at 788.

[80] *Id.* at 788-89; *see also* Joy v. North, 692 F.2d 880, 891 (2d Cir. 1982)(Second Circuit construed Connecticut law as willing to impose similar two-step rule).

[81] *Zapata*, 430 A.2d at 785-86; *see also* Abramowitz v. Posner, 672 F.2d 1025, 1031

ever, was the issue of when demand would be excused as futile.

In the instant case,[82] the court found that since demand futility was inseparably related to the business judgment rule,[83] the business judgment of the directors should have been analyzed to determine if demand was to be excused.[84] The court reasoned that the business judgment rule presupposes that a managerial decision was made in good faith,[85] and since the rule can only be asserted by disinterested directors,[86] a specific allegation of directorial prejudice with particular facts would create a reasonable doubt that would rebut the presumption of unbiased judgment.[87] The court concluded that because the plaintiff's allegations were conclusory,[88] and a derivative action complaint requires factual particularity,[89] then the requisite reasonable doubt was not created and demand was not excused.[90]

The *Aronson* decision has injected the requirement of factual particularity heretofore unconsidered by the *Zapata* court. Now a stockholder must first show, through specific allegations, a reasonable doubt as to the good faith of the directors in order to have demand excused due to futility. If the plaintiff does not establish the reasonable doubt, he will be required to make demand, and a subsequent refusal to litigate by the board will be enforced.[91] Conversely, if demand is excused and the board subsequently attempts to dismiss the action, the court

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(2d Cir. 1982)(*Zapata*'s demand-refused/demand-excused distinction followed). *But see* Lewis v. Curtis, 671 F.2d 779, 786 (3d Cir. 1982)(Third Circuit stated that different standards of directorial disinterest should not be applied).

[82] *Aronson*, 473 A.2d at 805. Subsequent to the *Zapata* decision, several derivative suits were filed without demand to take advantage of the favorable two-step test. *Id.* at 813. Like the *Zapata* allegations, the complaints pleaded demand futility due to board interest, approval, or acquiescence in the wrongdoing. *Id.* The question of when demand was futile then became of critical importance. *Id.* at 807.

[83] *Id.* at 812; *see* Cramer v. General Tel. & Elecs. Corp., 582 F.2d 259, 274 (3d Cir. 1978)("inextricably linked"), *cert. denied*, 439 U.S. 1129 (1979).

[84] *Aronson*, 473 A.2d at 812-13.

[85] *See supra* note 46.

[86] *Aronson*, 473 A.2d at 812.

[87] *Id.* at 814.

[88] *Id.* at 818. Plaintiff's allegation of domination and control was rejected by the court because Fink's stock amounted to less than a majority. *Id.* at 815-16; *see supra* note 37. The allegation of directorial approval was disallowed under a *Kauffman* analysis. *Aronson*, 473 A.2d at 817; *see supra* note 44 and accompanying text. Plaintiff's argument that the directors would have to sue themselves was dismissed under the bootstrap theory. *Aronson*, 473 A.2d at 818; *see supra* note 68 and accompanying text.

[89] *See supra* note 3.

[90] *Aronson*, 473 A.2d at 818.

[91] *See supra* notes 71 and 78 and text accompanying note 71.

will apply its own independent business judgment via the *Zapata* two-step test[92] to see if dismissal was properly made. In a situation where the board is not composed of disinterested directors, it is submitted that the court will consistently find the subsequent dismissal was not made in good faith since the court has already established a reasonable doubt as to the board's business judgment for purposes of demand futility.[93] Consequently, it is imperative for a stockholder to plead sufficient facts with particularity. Under the above construction, if a plaintiff pleads sufficiently to excuse demand, he will escape any future assertions of business judgment by the board. If the plaintiff makes conclusory allegations, he may lose his cause of action entirely. This interpretation is consistent with the principle stated in *Zapata* that a balancing point[94] must be reached where valid stockholder action cannot be "unfairly trampled on," while at the same time allowing the corporation to rid itself of meritless litigation. The *Aronson* decision provides a functional framework for demand futility while simultaneously eliminating future uncertainties[95] as to Delaware's business judgment rule.

Peter C. Abide

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[92] *Zapata*, 430 A.2d at 788-89. This presupposes that the first step of corporate good faith has been shown.

[93] *See supra* note 71 and text accompanying note 70.

[94] *See Zapata*, 430 A.2d at 786-87 (court noted the need for a balancing test).

[95] *See supra* notes 73 and 77.

Torts—Products Liability—Where a Plaintiff Cannot Identify Which Drug Company Manufactured the DES Ingested, a Cause of Action Exists Under the Market-Share Alternate Theory of Liability

Plaintiffs[1] filed suit in the Superior Court of Pierce County, Washington, to recover compensation[2] from defendants[3] for injuries allegedly caused by ingestion of diethylstilbestrol (DES).[4] During her pregnancy, plaintiff-mother ingested DES which subsequently caused injury to her daughter.[5] Because of the length of time from the ingestion of DES to the diagnosis of injuries (sixteen years) and because DES was marketed generically, neither plaintiffs nor plaintiffs' physician and pharmacist could remember which drug company manufactured the DES ingested by plaintiff-mother.[6] Since the plaintiffs could not identify which drug company manufactured the DES ingested, they sued numerous drug companies under the concert of action theory of liability.[7] The plaintiffs alleged that concerted action was demonstrated by collaboration in a testing and marketing agreement to use the same chemical formula to manufacture DES and a marketing strategy which caused DES prescriptions to be filled without regard to the brand prescribed.[8] Defendant drug companies moved for summary judgment, alleging that plaintiffs' failure to identify the manufacturer of the DES ingested prevented a cause of action.[9] The trial court dis-

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[1] Plaintiffs were Shirley Martin and her daughter Rita Martin. Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368, 371 (1984).

[2] Martin v. Abbott Laboratories, 689 P.2d 368, 371-72 (1984). Compensation sought included damages for personal injuries, pain and suffering, and dissolution of the parent-child relationship. *Id.*

[3] Defendants were Abbott Laboratories, numerous other drug companies who manufactured the kind of drug ingested by plaintiff-mother, and plaintiffs' pharmacist. *Id.*

[4] *Id.* at 371. Diethylstilbestrol (DES) was a synthetic estrogen hormone used to prevent miscarriages. *Id.* at 373-74; *see infra* notes 21-27 and accompanying text.

[5] Martin v. Abbott Laboratories, 689 P.2d 368, 371 (1984). A diagnosis of clear cell adenocarcinoma of the vagina necessitated a radical hysterectomy, a pelvic node dissection and a partial vaginectomy. *Id. See generally* Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham L. Rev. 963, 964-68 (1978)(discussing type of cancer DES produced).

[6] Martin v. Abbott Laboratories, 689 P.2d 368, 371 (1984).

[7] *Id.* at 371-72.

[8] *Id.* at 372.

[9] *Id.*

missed those drug companies who proved that they did not market DES in the dosage or form ingested by the plaintiff-mother or for the treatment of pregnancy problems. The trial court also dismissed drug companies that proved they did not market DES in plaintiffs' state and dismissed a drug company that proved the wholesale price charged by the manufacturer exceeded the price charged by plaintiffs' pharmacist.[10] The trial court refused to dismiss the two remaining drug companies because material issues of fact existed as to whether the DES produced by those companies was that ingested by the plaintiff-mother.[11] The trial court rejected the concert of action theory of liability advanced by plaintiffs, however, because a number of drug companies would be liable under this theory even though they could prove that they did not manufacture the DES ingested by the plaintiff-mother.[12] Instead, the trial court applied the theory of alternative liability to permit a cause of action because it would result in a fairer allocation of liability.[13] In appealing the dismissal of the other drug companies, the plaintiffs argued that issues of fact existed which justified liability under the concert of action, enterprise or market share theory of liability.[14] On appeal, the Supreme Court of Washington, *held*, affirmed, reversed and remanded in part.[15] Where a plaintiff cannot identify the manufacturer of the DES ingested, each defendant manufacturer is liable for a portion of the judgment equal to its percentage of the DES market in plaintiffs' geographic area under the market-share alternate theory of liability. *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984).

Since the beginning of this century, American courts have made several important changes in products liability law[16] to address the le-

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 373.

[15] *Id.* at 372-73. Two drug companies appealed the denial of their motions for summary judgment, arguing that plaintiffs failed to identify them as the manufacturer of the DES ingested. *Id.* The Supreme Court of Washington consolidated both appeals for review. *Id.* at 373. The supreme court affirmed denial of summary judgment to Stanley Drug Products and Kirkman Laboratories, reversed motions granted to two other drug companies, and affirmed the remaining grants of summary judgment. *Id.* at 389. In remanding, the supreme court ordered the trial court to apply the market-share alternate theory to allocate liability between the defendants. *Id.*

[16] The law of products liability had its genesis in the English case of Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842). W. PROSSER & W. KEETON, THE LAW OF TORTS § 96 (5th ed. 1984). In *Winterbottom*, the plaintiff, injured by a collapsing stagecoach,

gal problems that have arisen with the emergence of a consumer-oriented society. These changes include the abolition of the privity of contract requirement in negligence and breach of warranty causes of action[17] and the development of strict liability in tort.[18] Despite these changes, most courts have consistently refused to abandon the traditional requirement that a plaintiff identify the manufacturer of the defective product that causes his injuries.[19] As Prosser states, "An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered."[20] In recent years, however, cases involving DES,[21] in which manufacturer identification is usually impossible,[22]

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sued the party responsible for maintaining and repairing the coach. *Winterbottom*, 152 Eng. Rep. at 403. The court denied recovery because the plaintiff and defendant were not in privity of contract. *Id.* at 405. *See generally* James, *Products Liability*, 34 TEX. L. REV. 44, 44 (1955)(discussing historical development of products liability law).

[17] *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 84 (1960)(privity not required in action based on implied warranty of fitness); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053 (1916)(privity not required in negligence action against car manufacturer); Baxter v. Ford Motor, 168 Wash. 456, 12 P.2d 709, 412 (1932)(privity not required in action for breach of express warranty). *See generally* Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100-14 (1960)(discussion of abandonment of privity requirement in *MacPherson* and its application in other areas of products liability law); Prosser, *Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791 (1966)(discussing complete abandonment of privity requirement in cases following *MacPherson*); Comment, *The DES Dilemma: An Analysis of Recent Decisions*, 52 MISS. L. J. 199, 201-204 (1982)(discussing origin and abandonment of privity requirement).

[18] *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1963)(shifting theoretical foundation of strict liabilty from contract principles to tort principles); *see also* RESTATEMENT (SECOND) OF TORTS § 402A (1977)(subjecting manufacturers to strict liability in tort for selling defective products). *See generally* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 23-48 (1980)(analyzing development of products liability from privity to strict liability in tort).

[19] 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY 2d § 1:41 (1974); *see, e.g.*, O'Donnell v. Geneva Metal Wheel Co., 183 F.2d 733, 738 (6th Cir. 1950)(identification of manufacturer of defective wheel essential element in determining liability), *cert. denied* 341 U.S. 903 (1951); McDonough v. General Motors Corp., 6 Mich. App. 239, 148 N.W. 2d 911, 913 (1967)(recovery denied because of inability to identify correct manufacturer); Rockett v. Pepsi Cola Bottling Co., 460 S.W. 2d 737, 738 (Mo. Ct. App. 1970)(recovery denied due to inability of plaintiff to identify specific manufacturer of soda containing foreign substance).

[20] W. PROSSER & W. KEETON, *supra* note 16, § 41.

[21] DES is a synthetic estrogen hormone. PHYSICIANS' DESK REFERENCE 1141-43 (39th ed. 1985).

[22] Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W. 2d 164, 167 (1984). In one of the

have prompted some courts to formulate new theories to circumvent the identification requirement and to allocate liability among multiple defendants.[23]

Drug companies originally produced DES in the early 1940's for treatment of menopausal problems.[24] In 1947 the Food and Drug Administration approved the marketing of DES to prevent pregnancy complications.[25] Between 1947 and 1971 approximately three hundred drug companies produced and marketed DES for treatment of pregnancy problems[26] until studies indicated a link between DES and cancer in the daughters of mothers who ingested DES while pregnant.[27] In most DES cases plaintiffs have been unable to identify the manufacturer of the DES they ingested because (1) the cancer did not manifest itself until years, even decades, after ingestion, (2) the drug was produced by approximately three hundred drug companies using identical chemical formulas, and (3) the drug was marketed in generic form with no identifiable shape, color or markings.[28] Further, pharmacists filled prescriptions with whatever brand was in stock even when a particular brand was specified in a prescription.[29]

Instead of denying recovery to plaintiffs solely because they could not identify the manufacturer of the DES they ingested, some courts have adapted theories used in joint tortfeasor cases to circumvent the

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initial DES cases, the court granted defendant's motion for summary judgment because the plaintiff failed to identify the manufacturer of the DES ingested. Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978). Other courts in DES suits also required identification of the manufacturer. *See, e.g.*, Tidler v. Eli Lilly & Co., 95 F.R.D. 332, 333-34, 336 (D.D.C. 1982)(not allowing departure from traditional requirement of proving defendant causation); Pipon v. Burroughs-Wellcome Company, 532 F. Supp. 637, 638-39 (D.N.J. 1982)(requiring plaintiff to identify manufacturer of defective product in order to recover); Mizell v. Eli Lilly & Co., 526 F. Supp. 589, 596 (D.S.C. 1981)(same); Payton v. Abbott Labs, 386 Mass. 540, 437 N.E. 2d 171, 188 (1982)(same). *See generally* W. PROSSER & W. KEETON, *supra* note 16, § 103 (discussing rationale for requiring defendant identification). One of the few cases where the plaintiff was able to identify the manufacturer of the DES ingested was Lyons v. Premo Pharmaceutical Labs, 170 N.J. Super. 183, 406 A.2d 185 (1979), *cert. denied*, 82 N.J. 267, 412 A.2d 774 (1979). In *Lyons*, the plaintiff traced the ingested DES through her druggist to Premo Pharmaceutical Labs. *Lyons*, 412 A.2d at 192.

[23] *See infra* text accompanying notes 68-75, 91-97.

[24] Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W. 2d 37, 43 (1984).

[25] Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W. 2d 164, 166 (1984).

[26] Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W. 2d 37, 44 (1984).

[27] Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W. 2d 164, 167 (1984). *See generally* Comment, *supra* note 5, at 964 n.5 (citing medical literature investigating link between DES and cancer).

[28] Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W. 2d 37, 44 (1984).

[29] *Id.*

identification requirement and to allocate liability. One theory DES courts have used is alternative liability, which was developed by the California Supreme Court in *Summers v. Tice*.[30] In *Summers*, the plaintiff could not prove which of two hunters injured him when they simultaneously fired shotguns in his direction.[31] Rather than deny recovery to the innocent plaintiff because he could not identify which defendant injured him, the court shifted the burden of proving causation to the negligent defendants[32] and held that if neither could prove which one fired the shot that hit the plaintiff, both were jointly liable for the entire damage.[33] Under the theory of alternative liability, where it is clear that two or more defendants have acted negligently, but the negligence of only one defendant caused the injury, the burden of proving defendant identification is shifted from the plaintiff to the defendants.[34] Shifting the burden of proof is based on the rationale that culpable defendants, not innocent plaintiffs, should bear the loss.[35]

DES courts have also relied on and adopted the theories discussed in *Hall v. E.I. Du Pont De Numours & Co.*, and its companion case, *Chance v. E.I. Du Pont De Numours & Co.*,[36] to permit plaintiffs to circumvent the identification requirement and allocate liability. In *Hall* and *Chance*, the court discussed the alternative liability theory of *Summers* and a second theory also derived from joint tortfeasor cases,

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[30] 33 Cal. 2d 80, 199 P.2d 1 (1948).

[31] *Summers*, 199 P.2d at 2.

[32] *Id.* at 4. The court noted that since both defendants were wrongdoers and since both created the situation in which the negligence of one of them injured the plaintiff, it was unfair to deny recovery to the innocent plaintiff solely because he was unable to identify the defendant causing the harm. *Id.*

[33] *Id.* at 4-5.

[34] W. PROSSER & W. KEETON, *supra* note 16, § 41.

[35] *Summers*, 199 P.2d at 4-5. Other courts have followed *Summers* in shifting the burden of proof of causation to defendants. *See, e.g.*, Ermdjian v. Interstate Bakery Corp., 153 Cal. App. 2d 590, 315 P.2d 19, 29 (1957)(burden shifted to defendants to refute causation); Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1, 5, 7 (1975)(defendants with duty of care toward plaintiff must prove they are not liable), *cert. denied*, 423 U.S. 929 (1975). *But see* Shunk v. Bosworth, 334 F.2d 309, 311-12 (6th Cir. 1965)(burden not shifted where no evidence existed of negligence on part of defendants); Smith v. Americania Motor Lodge, 39 Cal. App. 3d 1, 113 Cal. Rptr. 771, 773-74 (1974)(holding no substantial probability of negligence by defendants to justify shifting burden); Eley v. Curzon, 121 Cal. App. 2d 280, 263 P.2d 86, 89 (1953)(burden not shifted because plaintiff failed to establish negligence of any defendants). The burden-shifting principle of *Summers* has also been incorporated into the Second Restatement. *See* RESTATEMENT (SECOND) OF TORTS § 433B(3)(1965)(if two or more defendants were tortious and harm to plaintiff resulted from only one of their actions, then burden is on each to prove he did not cause the harm if uncertainty exists as to who caused plaintiff's injury).

[36] 345 F. Supp. 353 (E.D.N.Y. 1972).

the concert of action theory,[37] and developed a rationale for imposing liability on an entire industry.[38] In both *Hall* and *Chance*, several children were injured in separate accidents by dynamite blasting caps.[39] Because the plaintiffs in *Chance* could not identify the manufacturer from the cap fragments,[40] they brought suit against virtually the entire blasting cap industry and its trade association.[41] Attempting to circumvent the defendant identification requirement, the plaintiffs asserted that the defendants acted in concert when they decided not to print warnings on the blasting cap casings.[42] Denying defendants' motion to dismiss,[43] the court noted that the concert of action theory required plaintiffs to prove that the defendants acted according to a plan or implicit agreement to cause harm.[44] The court held that the defendants

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[37] *Id.* at 371-72. Under the concert of action theory, liability extends to everyone who acted tortiously according to a common plan based on an agreement, express or implied, to commit a tortious act. W. PROSSER & W. KEETON, *supra* note 16, § 46; *see also* RESTATEMENT (SECOND) OF TORTS § 876 (1977)(listing elements required to apply the concert of action theory). One typical category of cases applying the concert of action theory involves drag racing. *See, e.g.*, Bierczynski v. Rogers, 239 A.2d 218, 221 (Del. 1968)(extending liability to defendant not directly responsible for impact with plaintiff); Nelson v. Nason, 343 Mass. 220, 177 N.E. 2d 887, 888 (1961)(extending liability to all race participants for injuries caused by one racer); Lemons v. Kelly, 239 Or. 354, 297 P.2d 784, 786-87 (1964)(same). A second common category of cases applying the concert of action theory is group assault. *See, e.g.*, Thompson v. Johnson, 180 F.2d 431, 434 (5th Cir. 1950)(holding co-defendants equally liable for acts of assault committed by one defendant); Thomas v. Doorlye, 175 Cal. App. 2d 545, 346 P.2d 491, 494 (1959)(assistance by one defendant made him equally liable as principal tortfeasor); Knott v. Litton, 81 So. 2d 124, 127 (La. App. 1955)(same).

[38] *Hall*, 345 F. Supp. at 373-74. The court's rationale has been called a "murky mixture" of the traditional theories of concerted action and alternative liability. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 723 (1982).

[39] *Hall*, 345 F. Supp. at 358. The two suits arose out of eighteen accidents which occurred across the United States. *Id.*

[40] *Id.* at 359. The plaintiffs in *Hall*, unlike those in *Chance*, identified the manufacturer who actually produced the cap causing the injury. *Id.* at 382. The court held that linking the injury to a particular manufacturer destroyed the joint liability aspects of that case. *Id.* The court reasoned that selection of two defendant manufacturers was arbitrary. *Id.* at 383.

[41] *Id.* at 358.

[42] *Id.* at 358-59. Plaintiffs alleged not only that defendants knew of the danger to children, but also that defendants, through their trade association, consciously and collectively agreed not to print warning labels. *Id.* at 359. The trade association maintained statistics on accidents involving children and lobbied against legislation which would have required warning labels to be printed on the casings. *Id.*

[43] *Id.* at 386.

[44] *Id.* at 371-72.

could have acted in concert[45] when they adhered to, by mutual agreement, the safety standards formulated by their trade association.[46] Relying on *Summers*, the court also shifted the requirement of proving defendant identification for causation purposes to the defendants.[47] The court also noted that the theory of enterprise liability was applicable to the case but stated that for an entire industry to be held jointly liable under this theory, plaintiffs must establish both that the defendants were jointly aware of the risks and also that the defendants had the joint capacity to minimize those risks.[48]

While plaintiffs in DES cases have advanced the theories of alternative liability, concert of action, and enterprise liability to circumvent the identification requirement,[49] courts have not been uniform in deciding whether to apply them to the fact patterns and legal problems peculiar to DES cases.[50] The significance of the DES decisions lies in observing how courts have grappled with the legal and ethical problems of circumventing defendant identification and fairly allocating liability. Even more important are the novel theories—based on the theories of alternative liability, concert of action, and enterprise liability—developed by a few courts to respond to these problems.

Failure to identify the specific drug company was not a barrier to

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[45] *Id.* at 373-74. The court used "concert of action" and "joint control of risk" interchangeably. *Id.*

[46] *Id.* The court held that liability extended to an entire group of defendants even though only one defendant directly caused the injury. *Id.* at 372. The court subordinated the issue of which defendant directly caused the injuries to the fact that the defendants consciously and jointly participated in conduct which resulted in physical injury. *Id.*

[47] *Id.* at 379. The court held that the plaintiffs were required to show some causal connection between the group-created risk and their injuries. To establish this connection, the court held that the plaintiffs must show by a preponderance of the evidence that the caps involved in the incident were the products of the named defendant manufactures rather than a foreign manufacturer. *Id.* The burden then shifted to the defendants to prove they did not cause the injuries. *Id.* at 380.

[48] *Id.* at 378. The United States Court of Appeals for the Fifth Circuit refused to apply the enterprise liability theory in a recent asbestosis case. *See* Thompson v. Johns-Mansville Sales Corp., 714 F.2d 581, 583 (5th Cir. 1983)(theory represents radical departure from traditional tort theories); *see also* Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121, 1128-29 (1981)(legal theory would cause abandonment of general principle that manufacturers are only responsible for damages caused by defective product). *See generally* R.EPSTEIN, *supra* note 18, at 156-60 (analyzing *Hall* court's reasoning and discussing *Hall*'s impact in products liability cases); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 153-65 (1976)(discussing evolution of enterprise liability theory and societal justification for its use).

[49] *See infra* text accompanying notes 52-53 and 81-83.

[50] *See infra* notes 57, 67 and text accompanying note 84.

recovery in the California case of *Sindell v. Abbott Laboratories*.[51] In *Sindell*, the plaintiff filed suit[52] against ten drug companies and sought recovery under the theories of alternative liability, concert of action, and enterprise liability.[53] The defendant drug companies argued that the theory of alternative liability was inapplicable since, in *Summers*, the burden of proving causation was shifted because the defendants were in a better position to know which of them caused the injury.[54] The defendants in *Sindell* argued that since they could not determine which one of them had manufactured the DES which Sindell's mother ingested, the burden of proof should not be shifted.[55] Rejecting the defendants' arguments, the Supreme Court of California held that the defendants' lack of information regarding the identity of the DES manufacturer did not preclude application of the *Summers* principle.[56] However, the court held that alternative liability, as applied in *Summers*, was inapplicable in this suit because, unlike *Summers*, all possible parties who could have caused the plaintiff's injury were not joined as defendants.[57]

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[51] 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

[52] *Sindell*, 607 P.2d at 925, 163 Cal. Rptr. at 133. Plaintiff certified a class of women injured by DES. *Id.* at 925 n.1, 163 Cal. Rptr. at 133 n.1.

[53] *Id.* at 925-26, 163 Cal. Rptr. at 133-34. Each cause of action alleged that defendants had acted on the basis of express and implied agreements and in reliance upon, and ratification and exploitation of, each other's testing and marketing methods. *Id.* at 926, 163 Cal. Rptr. at 134.

[54] *Id.* at 929, 163 Cal. Rptr. at 137. This agreement had proved persuasive to a California appellate court only two years before, in McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978). Cases such as *Hall* were distinguished on the ground that in those cases the plaintiff was able to show concerted activity, something which the plaintiff in *McCreery* failed to do. 150 Cal. Rptr. at 735-36.

[55] *Sindell*, 687 P.2d at 929, 163 Cal. Rptr. at 137.

[56] *Id.* at 930, 163 Cal. Rptr. at 138.

[57] *Id.* at 931, 163 Cal. Rptr. at 139. There were over 200 manufacturers of DES, any one of which might have made the injury-producing drug. *Id.*. Plaintiff relied on two old Mississippi cases, Moore v. Foster, 182 Miss. 15, 180 So. 73 (1938), and Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1927), for the proposition that the burden of proof may be shifted even if not all defendants are before the court. The *Summers* court distinguished these cases on the ground that they involved concerted action rather than burden-shifting. 607 P.2d at 930 n.15, 163 Cal. at 138 n.15; *see also* Pipon v. Burroughs-Wellcome Co., 532 F. Supp. 637, 638-39 (D.N.J. 1982)(rejecting application of alternative liability theory in DES case because all tortfeasors not joined); *accord* Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1016 (D.S.C. 1981); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121, 1126-28 (1981); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37, 46 (1984). *But see* Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, 174 (1984)(allowing application of alternative liability theory in DES case because all manufacturers were before the court).

In asserting the concert of action theory of liability, the plaintiff alleged that the defendants' negligent conduct was the result of express and implied agreements concerning use of one chemical formula, testing and marketing methods, and lack of warnings.[58] The court rejected application of the concert of action theory because the parallel activities in which defendants engaged were not tortious but were standard industry practices.[59] The court based its holding on the rationale that if customary industry practices constituted concerted action, then any manufacturer would be liable for the defective products of the entire industry even if it proved it did not manufacture the product which injured a consumer.[60]

The plaintiff also attempted to recover under the enterprise liability theory articulated in *Hall*. In support of this theory the plaintiff argued that defendants as an industry collaborated in the production, marketing, and promotion of DES and that they adhered to an industry-wide safety standard in testing the product.[61] The court rejected plaintiff's allegations that defendants collaborated in the production, marketing,and promotion of DES for the same reason it rejected this allegation under the concert of action theory. While discounting plaintiff's allegations on this point, the court stated, however, that each manufacturer could, on proper proof, be held liable under the enterprise liability theory for adherence to an industry-wide standard of safety.[62] The court made a crucial distinction between the concert of

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[58] *Sindell*, 607 P.2d at 932, 163 Cal. Rptr. at 140.

[59] *Id.* at 933, 163 Cal. Rptr. at 140-41. The court reasoned that plaintiff's allegations did not rise to the level required to state a cause of action; that is, they did not assert the existence of a common plan to test inadequately and to fail to warn, nor did they charge that the defendants had aided and abetted each other in these omissions. *Id.*

[60] *Id.* at 933, 163 Cal. Rptr. at 141. To establish liability under the concert of action theory, each defendant in the group must have acted tortiously. W. PROSSER & W. KEETON, *supra* note 16, § 46.

[61] *Sindell*, 607 P.2d at 934, 163 Cal. Rptr. at 142.

[62] *Id.* The court rejected plaintiff's allegations that collaboration in production, marketing and testing DES were sufficient to impose enterprise liability. The approach was similar to that taken in rejecting the concert of action theory. 607 P.2d at 933-34, 163 Cal. Rptr. at 141-42. The court relied heavily on a student comment, *see supra* note 5, in suggesting that the plaintiff might have a cause of action for violation of an industry-wide safety standard. The requirements of proof suggested by the comment are these:

1. There existed an insufficient, industry-wide standard of safety as to the manufacture of the product.
2. Plaintiff is not at fault for the absence of evidence identifying the causative agent but, rather, this absence of proof is due to defendant's conduct.
3. A generically similar defective product was manufactured by all the defendants.

action theory and enterprise liability by reasoning that in the former, the mutual agreement or plan is the cause of a plaintiff's injury, but in the latter, the cause of a plaintiff's injury is the industry-wide safety standard itself. Therefore, by adhering to the industry standard, each manufacturer in a sense contributed to the injury.[63] However, the court refused to apply the enterprise liability theory.[64] In rejecting its application, the court distinguished *Hall* in three ways. First, the court noted the disparity in the number of manufacturers involved in the production of DES compared to the number involved in the manufacture of blasting caps in *Hall*.[65] Second, there was no allegation of the existence of a trade association for DES manufacturers, whereas in *Hall* the existence and role of a trade association was an integral factor in the court's holding because the manufacturers delegated the warning responsibility to the trade association and it coordinated exchange of information and collected data about accidents involving children.[66] Third, the court recognized that drug industry standards are usually those which are promulgated by the Food and Drug Administration and which manufacturers are compelled to follow.[67] Although the court

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4. Plaintiff's injury was caused by this defect.

5. Defendants owed a duty to the class of which plaintiff was a member.

6. There is clear and convincing evidence that plaintiff's injury was caused by a product made by one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.

7. All defendants were tortfeasors.

Comment, *supra* note 5, at 995, *quoted in Sindell*, 607 P.2d at 934 n.24, 163 Cal. Rptr. at 143 n.24.

[63] *Sindell*, 607 P.2d at 934-35, 163 Cal. Rptr. at 142-43. The court based this distinction on another passage from the Fordham comment:

> [T]he industrywide standard becomes itself the cause of plaintiff's injury, just as defendants' joint plan is the cause of injury in the traditional concert of action plea. Each defendant's adherence perpetuates this standard, which results in the manufacture of the particular, unidentifiable injury-producing product. Therefore, each industry member has contributed to plaintiff's injury.

Comment, *supra* note 5, at 997, *quoted in Sindell*, 607 P.2d at 935, 163 Cal. Rptr. at 143.

[64] *Sindell*, 607 P.2d at 935, 163 Cal. Rptr. at 143.

[65] *Id.* at 935, 163 Cal. Rptr. at 143. There were over 200 manufacturers of DES. *Id.* In *Hall*, the six blasting cap manufacturers constituted virtually the entire blasting cap industry in the United States. *Hall*, 345 F. Supp. at 358. Thus in *Hall* there was a greater probability of joint awareness of the risk and of joint capacity to reduce the risk. 345 F. Supp. at 378.

[66] *Sindell*, 607 P.2d at 935, 163 Cal. Rptr. at 143. The trade association in *Hall* had been responsible for collecting information regarding accidents and disseminating warnings to blasting cap users and to the public. *Hall*, 345 F. Supp. at 359.

[67] *Sindell*, 607 P.2d at 935, 163 Cal. Rptr. at 143. Although the court thought that

rejected a traditional application of the alternative liability theory as applied in *Summers*,[68] the court modified and incorporated the theory in formulating the novel theory of market share liability.[69] Basing its market share theory on the rationale that it is better for culpable defendants to bear the cost of injury than an innocent plaintiff,[70] the court both suspended the proof of causation requirement provided that the plaintiff join a substantial share of DES manufacturers who might have produced the DES ingested,[71] and also shifted to defendants the burden of proving that they did not produce the DES which caused plaintiff's injuries.[72] Further, the court imposed liability for 100% of the judgment on the defendants, but apportioned it according to the

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adherence to government standards could not completely absolve a manufacturer of liability, it stated that it would be "unfair to impose . . . liability for injuries resulting from the use of a drug which [the manufacturer] did not supply simply because it followed the standards of the industry." *Id.* Other courts in DES cases have also rejected application of the enterprise liability theory. *See, e.g.*, Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1017-18 (D.S.C. 1981)(relying on *Sindell*, court refused to apply enterprise liability); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121, 1128-29 (1981)(same). *See generally* Comment, *supra* note 5, at 978-85 (discussing application of enterprise liability); Note, *Industry-Wide Liability and Market Share Allocation of Damages*, 15 GA. L. REV. 423, 431-38 (1981)(tracing development of enterprise liability).

[68] *See supra* text accompanying notes 30-35.

[69] *Sindell*, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45. The court modified the alternative liability theory by shifting the burden of proving causation to the defendants. Instead of holding them equally liable, however, the court allocated liability in proportion to each defendant's share of the DES market. *Id.*

[70] *Id.* The other policy reasons given by the court for modifying the *Summers* rule were the familiar ones underlying the general theory of strict liability in tort: manufacturers are better able to bear the cost of injury since they can distribute the cost over the area of the consuming public, and manufacturers are also in the best position to discover and warn against hazards involved in the use of the product. *Id; cf.* Escda v. Coca-Cola Bottling Co., 190 P.2d 436, 440-44 (1944)(Trayner, J., concurring)(negligence not proper standard of recovery for injury caused by defective product; manufacturer should be absolutely liable since he is in best position to protect public); Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962)(purpose of strict liability is to insure that cost of injuries from defective products is borne by manufacturers rather than helpless plaintiffs).

[71] *Sindell*, 607 P.2d at 937, 163 Cal. Rptr. at 145. Some commentators have criticized the court's failure to define what percentage constituted a "substantial share" of the DES manufacturers. *See, e.g.*, R. EPSTEIN, *supra* note 18, at 158-60 (demonstrating difficulty in calculating defendants' market share); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 672-73 (1981)(criticizing *Sindell* court's failure to define substantial share of DES manufacturers).

[72] *Sindell*, 607 P.2d at 936, 163 Cal. Rptr. at 144. The court permitted the defendants to exculpate themselves by proving that they did not market DES in plaintiffs' geographic area. *Id.* at 936, 163 Cal. Rptr. at 145.

percentage share of the market each defendant held in plaintiff's geographic area.[73] In his dissent, Justice Richardson noted that holding defendants liable for 100% of the judgment caused individual liability for damages to exceed the market share percentage of each defendant.[74] Justice Richardson argued that this method of liability allocation produced an inequitable distribution of liability.[75]

One of the first DES cases to consider application of the *Sindell* market share theory was *Ferrigno v. Eli Lilly & Co.*[76] In *Ferrigno*, the plaintiffs attempted to circumvent the identification problem by using the *Sindell* approach of joining a substantial share of DES manufacturers to reduce the probability that the actual manufacturer was not a

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[73] *Id.* at 937, 163 Cal. Rptr. at 145; see Comment, *supra* note 5, at 995-1000, 1003-06 (proposing use of market share theory in multiple defendant litigation). In suits against multiple asbestos manufacturers, various courts have accepted and rejected the *Sindell* market share theory of liability allocation. *See, e.g.*, Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1357-60 (D. Tex. 1981)(permitting use, at defendant's request, of market share theory in asbestos fiber suit); *In re* Related Asbestos Cases, 543 F. Supp. 1152, 1158 (D. Cal. 1982)(rejecting application of market share theory in asbestos fiber suit). *See generally* Comment, *supra* note 5, at 974 n.36 (discussing application of market share theory to asbestos and environmental litigation); Note, *supra* note 71, at 677-79 (discussing applicability of market share theory to other areas of products liability litigation involving multiple manufacturers of generic products).

[74] *Sindell*, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting). Justice Richardson criticized the court's market share theory first because it placed a greater burden on manufacturers amenable to suit in California, and second because of the inequity of forcing a manufacturer to bear a greater percentage of the judgment than its market share percentage. *Id.*

[75] *Id.* at 940-41, 163 Cal. Rptr. at 148-49. *Sindell* held manufacturers liable for 100% of the judgment. *Id.* Holding manufacturers liable for the entire judgment caused each manufacturer to bear a larger portion of the judgment than its market share percentage. In a $1,000,000 DES suit, manufacturers would bear a larger percentage of the total judgment than their market share as illustrated below:

DES Manufacturers	Market Share	X	Market Share/Total Market Represented Total Judgment	=	Portion of Judgment	Percentage of Total Judgment
D_1	15%		15/75 x $1,000,000		$ 200,000	20 %
D_2	20%		20/75 x 1,000,000		266,667	25.7%
D_3	40%		40/75 x 1,000,000		533,333	53.3%
	75%				$1,000,000	100 %

See Note, *supra* note 67, at 444 (offering different interpretation of *Sindell* market share liability theory); Note, *supra* note 71, at 672-73 (criticizing market share theory and proposing more equitable theory for liability allocation).

[76] 175 N.J. Super. 551, 420 A.2d 1305 (1980).

defendant.[77] The Superior Court of New Jersey rejected this aspect of the *Sindell* theory and held that even though the probability that the actual tortfeasor is not a defendant is likely where a substantial number of DES manufacturers is not joined, the burden of proof should nevertheless be on the defendants to exculpate themselves.[78] In rejecting this aspect of the *Sindell* theory, the court followed existing New Jersey precedent.[79] In allocating liability among defendants, however, the court followed the *Sindell* market share liability theory because it was a "reasonable solution" to determine the percentage of fault among the defendants.[80]

The New York Court of Appeals addressed the defendant identification issue in *Bichler v. Eli Lilly & Co.*[81] In *Bichler*, the plaintiff sued only one DES manufacturer and used the concert of action theory to establish liability.[82] To establish concerted action, the plaintiff alleged the existence of an implied agreement among DES manufacturers which could be deduced from "the consciously parallel conduct of the companies."[83] The court held that the existence of an implied agreement could be inferred from the parallel activities of eight manufacturers which included the filing of applications with the Food and Drug Administration within the same time period to market DES for pregnancy problems; reliance by the eight manufacturers on the same research and testing performed by three research teams; and requests by each of the eight to market DES in a dosage five times more potent than the maximum approved seven years earlier.[84] The court held that not only was an inference of concerted action from these activities valid, but also that it was valid to infer that the activities of the eight manufacturers substantially encouraged one hundred and forty more

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[77] *Ferrigno*, 420 A.2d at 1314-15. Failure to join a substantial number of manufacturers as defendants may prove fatal to the cause of action. *See* Ryan v. Eli Lilly & Co., 544 F. Supp. 1004, 1007 (D.S.C. 1981)(only seven of 118 manufacturers named reduced likelihood that culpable manufacturer was included).

[78] *Ferrigno*, 420 A.2d at 1312-15.

[79] *Id.* at 1315. The principles adopted by the court in *Ferrigno* were based on Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (1975), *cert. denied*, 423 U.S. 929 (1975).

[80] *Ferrigno*, 420 A.2d at 1316. The court applied the *Sindell* market share theory to apportion liability according to each manufacturer's share of the DES market in plaintiff's geographic area. *Id; see* Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353, 1359 (E.D. Tex. 1981)(market share data may be admissible evidence in future enterprise liability case involving asbestos).

[81] 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S. 776 (1982).

[82] *Bichler*, 436 N.E.2d at 183-84, 450 N.Y.S.2d at 777-78.

[83] *Id.* at 187, 450 N.Y.S.2d at 781.

[84] *Id.* at 188-89, 450 N.Y.S.2d at 782-83.

companies to produce DES for pregnancy problems.[85]

Recently, the Supreme Court of Wisconsin explicitly rejected application of the *Sindell* market share theory to allocate liability in *Collins v. Eli Lilly & Co.*[86] In *Collins*, the court refused to follow the *Sindell* theory because of the difficulty in establishing a defendant's share of the market.[87] In formulating its own theory of recovery and liability allocation, the court held that once the plaintiff establishes a prima facie case under either traditional negligence or strict liability principles, the burden of proof shifts to defendants who may exculpate themselves by proving that they either did not produce DES during plaintiff's exposure period or that they did not market DES in plaintiff's geographic area.[88] If they could not exculpate themselves, the court held that liability should be allocated according to comparative negligence principles.[89] The court's rationale was that such principles enabled the jury to compare defendants' negligence and allocate the judgment in a way that more truly reflected each defendant's culpability.[90]

In the instant case, the Supreme Court of Washington reasoned that since plaintiffs should receive compensation for injuries caused by a defendant's negligence[91] and since the defendants were in a better financial position to bear the loss,[92] then failure to identify the actual

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[85] *Id.* at 189, 450 N.Y.S.2d at 783. Although the court acknowledged and explained the *Sindell* market share theory, it restricted its holding to the validity of the concert of action theory in DES cases, which was the primary issue on appeal. *Id.* at 185-86, n.5, 450 N.Y.S.2d at 779-80, n.5; *see* Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164, 176 (1984)(allowing cause of action in DES case under concerted action theory of liability). *But see* Lyons v. Premo Pharmaceutical Labs, Inc., 170 N.J. Super. 183, 406 A.2d 185, 190 (1979)(rejecting use of concerted action theory in DES case), *cert. denied*, 82 N.J. 267, 412 A.2d 774 (1979); Collins v. Eli Lilly & Co., 116 Wis. 2d 166, 342 N.W.2d 37, 46-47 (1984)(same).

[86] 116 Wis. 2d 166, 342 N.W.2d 37 (1984).

[87] *Collins*, 342 N.W.2d at 48. The court noted that many companies do not have records from which an accurate market share can be determined. *Id.* Further, even if companies do have records, determining the total market of which each company was a part may be impossible. *Id. But see* McElhaney v. Eli Lilly & Co., 564 F. Supp. 265, 270 (D.S.D. 1983)(adopting market share theory despite difficulty in establishing market percentage).

[88] *Collins*, 342 N.W.2d at 52.

[89] *Id.* at 53. Factors to be considered in allocating a percentage of liability included the size of the company's share of the market in plaintiff's area, whether the company conducted tests and used warning labels, and whether the company marketed DES for pregnancy problems after learning of the harmful side-effects. *Id.*

[90] *Id.*

[91] *Martin*, 689 P.2d at 381.

[92] *Id.* at 382. The court reasoned that the companies' liability insurance would cover

defendant responsible for the injuries should not prevent recovery.[93] The court reasoned further that since DES manufacturers placed a defective drug on the market,[94] each contributed to the risk of injury to the public, and since each contributed to the risk of injury, each manufacturer shared a degree of culpability in injuries that resulted from the production of a defective drug.[95] Finally, the court concluded that where a plaintiff cannot identify the manufacturer of the DES ingested but does prove that the defendants manufactured the type of DES ingested,[96] each defendant manufacturer is liable for a portion of the judgment equal to its percentage of the DES market in the plaintiff's geographic area.[97]

While some courts have adhered to traditional products liability law in requiring a plaintiff to identify the manufacturer of the DES

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any judgment, the companies could absorb the cost or they could pass the cost of any judgment on to consumers through the cost of their products. *Id.*

[93] *Id.* at 381. The court balanced the principle that a plaintiff should receive just compensation for injuries against the principle that a defendant should be liable only for the injuries it caused. *Id.* The determining factor in reconciling these principles was that the financial stability of drug companies placed them in a better position to bear the cost of injuries than to force blameless plaintiffs to bear the financial burden alone. *Id.*

[94] *Id.* at 382. The court noted that in reasoning that the defendants contributed to the risk of injury to the public, it did not mean that the defendants acted in concert under the concert of action theory of liability. *Id.*

[95] *Id.*

[96] *Id.* In holding that the plaintiffs need not identify the manufacturer of the DES ingested, the court placed on the plaintiffs the burden of proving that the plaintiff's mother ingested DES, that DES caused the subsequent injuries and that the defendants produced the type of DES ingested. *Id.* In defining "type," the court held that the DES ingested must be the same "dosage, color, shape, markings, size or other identifiable characteristics" as that manufactured by defendants. *Id.* The court permitted the defendants to exculpate themselves by proving either that they did not produce the type of DES ingested by plaintiff-mother, that the DES they produced was not marketed in plaintiffs' geographic area, or that they did not market DES during the period in which plaintiff-mother ingested the drug. *Id.*

[97] *Id.* at 382-83. While market share percentage limited a defendant's liability for damages, the court placed the burden of proof on each defendant to establish its percentage of the market. *Id.* The court first assigned equal market shares to defendants until they established their market share. *Id.* If a defendant could not establish its market share, the court permitted it to implead other drug companies to dilute the presumed market percentage imposed by the court. *Id.* If all defendants established their percentage of the market, then the amount of the judgment for which they could be liable equalled their aggregate market percentage. *Id.* In a $1,000,000 DES suit, for example, each defendant would be liable for a portion of the judgment equal to its market share, as illustrated in the following chart:

ingested in order to recover,[98] other courts have circumvented the defendant identification requirement by developing theories to allocate liability and to shift the burden of proof to defendants.[99] The primary problem facing DES plaintiffs is defendant identification.[100] The primary problem facing courts in DES litigation is how to compensate innocent plaintiffs while not forcing defendants to pay for injuries they did not cause.[101] While one court has proposed using comparative negligence principles to resolve the problem of liability allocation,[102] this is an unfavorable solution because its application can result in liability that far exceeds the probability that a defendant caused the injuries. Where the defendant cannot be identified, liability for the judgment should be allocated, if at all, according to the probability that each defendant caused the injuries, not according to its relative negligence. Applying comparative negligence principles, one defendant may have only ten percent of the DES market in plaintiff's geographic area, yet its liability for the judgment could be far greater than a defendant who has sixty percent of the market primarily because the former failed to take as many precautions in producing DES as the latter.[103] The market-share alternate theory provides a more favorable solution to the problems of defendant identification and liability allocation than comparative negligence principles by permitting a plaintiff to circumvent defendant identification and limiting the liability of manufacturers to a percentage equal to their market share.[104] The market-share alternate

DES Manufacturers	Market Share	X	Total Judgment	=	Portion of Judgment	Percentage of Total Judgment
D_1	15%		$1,000,000		$150,000	15%
D_2	20%		1,000,000		200,000	20%
D_3	40%		1,000,000		400,000	40%
	75%				$750,000	75%

See supra note 75. The court explicitly rejected the *Sindell* requirement that the plaintiff join a substantial share of manufacturers because under the market-share alternate theory, the probability that a manufacturer caused the plaintiff's injury is not changed by joining a substantial share because a manufacturer's liability is equal to the probability (based on its percentage of the market) that it caused the injury. *Martin*, 689 P.2d at 382.

[98] *See supra* note 22.

[99] *See supra* text accompanying notes 68-73, 88-90, and 94-97.

[100] *Martin*, 689 P.2d at 381; *see supra* text accompanying notes 28-29.

[101] *Martin*, 689 P.2d at 381.

[102] *See supra* text accompanying notes 87-90.

[103] *See supra* note 89.

[104] *See supra* notes 96-97 and accompanying text. While defendants who did not

theory is not a significant departure from the *Sindell* market share liability theory, but it does result in a more equitable allocation of liability.[105] However, no matter how equitable this theory appears, the evidence upon which the judgment is allocated (market share percentage) is nothing more than a mathematical probability which, no matter how accurate, is not a satisfactory theoretical or evidentiary substitute for proof of which manufacturer caused the plaintiff's injuries. The rationale courts offer for circumventing the identification requirement is that manufacturers are in a better financial position to pay for the injuries than are plaintiffs. While this rationale makes the imposition of liability based on probability more palatable, this thinking will impede market productivity and scientific research because it forces pharmaceutical manufacturers to shift their resources away from productivity and research and toward minimizing their risk of exposure to liability. Courts will probably continue to render conflicting decisions and in so doing recovery will be given to some and denied to others depending on where the plaintiff chooses her forum.

Lewis W. Bell

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cause the injuries are responsible for damages, the amount will not exceed their market share percentage. In *Martin*, the court reasoned that requiring a defendant to be liable for its market share was equitable because it contributed to the risk of injury by producing a harmful drug. *Martin*, 689 P.2d at 382.

[105] *Compare* note 75 *with* note 97. The market-share alternate theory is a refinement of the market share theory in that it allocates liability more equitably by limiting the amount of the total judgment to an amount equal to the aggregate market share percentage represented by defendants.

Constitutional Law—Eminent Domain—Fifth Amendment Public Use Test is Satisfied if a Public Purpose is Served

Plaintiffs[1] filed suit in the United States District Court for the District of Hawaii seeking to have the Hawaii Land Reform Act of 1967[2] declared unconstitutional.[3] The Act authorizes the state, by its power of eminent domain, to condemn specified privately owned residential land and to sell it to qualified lessees of the land.[4] The plaintiffs, trustees of these residential landholding estates, claimed that the Act violated their rights under the fifth amendment to the United States Constitution because the land was taken for a private rather than a public use.[5] The district court declared the Hawaii Land Re-

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[1] Plaintiffs were the trustees of an estate which owned large tracts of residential real estate in Hawaii. Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2321 (1984).

[2] Hawaii Rev. Stat. §§ 28-516-1 to -186 (1976 & Supp. 1983).

[3] *Midkiff*, 104 S. Ct. at 2321.

[4] *See* Hawaii Rev. Stat. §§ 28-516-1 to -186 (1976 & Supp. 1983). The Hawaii legislature determined that 47% of the state's land was owned by only 72 private landowners. The legislature concluded that this system of concentrated land ownership resulted in the distortion of the residential fee simple market, inflation of real estate prices, and injury to the public tranquility and welfare. *Midkiff*, 104 S. Ct. at 2325. The landowners' primary purpose in leasing, and not selling, the land was to avoid considerable federal tax liability. To satisfy the lessees' needs for redistribution of fees simple and the lessors' needs for less severe tax treatment, the legislature enacted the Hawaii Land Reform Act of 1967. *Id.* The Act employs a system of condemnation which alleviates the harsh tax consequences by classifying the transfer as involuntary. *Id.; see* § 28-516-27. The statute allows transferal of ownership of the condemned property either by purchase, *see id.* §§ 28-516-28, -30, or by lease, *see id.* §§ 28-516-28, -31, thereby redistributing fee simple title to the lessees.

The Act establishes a two-prong procedure by which transfer is executed. First, certain qualified lessees—those living on single-family residential lots that were part of five-acre minimum developmental tracts, *see id.* § 28-516-1(2), (11) —may apply to the Hawaii Housing Authority (HHA) to purchase their leasehold lots. *Id.* § 28-516-22. Second, upon receipt of a certain number of applications by qualified lessees, the HHA would hold a public hearing to determine whether the state's acquisition would "effectuate the public purposes" of the Act. *Id.* If a public purpose exists, the HHA has the option of taking the property by eminent domain or by purchase under the threat of eminent domain, subsequently acquiring the fee interests in the land by paying fair market value as determined either by a condemnation trial or through a negotiation process involving the lessor and the lessee. *See id.* § 28-516-56. The HHA, having acquired the fee owner's full interest, *see id.* § 28-516-25, would subsequently transfer title to those lessees seeking fee simple ownership. *See id.* §§ 28-516-28, -30, -31.

[5] Midkiff v. Tom, 483 F. Supp. 62, 65 (D. Hawaii 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983), *rev'd sub nom.* Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984). The fifth

form Act constitutional and entered summary judgment for the defendants.[6] The United States Court of Appeals for the Ninth Circuit reversed and remanded,[7] concluding that the Act violated the "public use" limitation of the fifth and fourteenth amendments.[8] On appeal, the United States Supreme Court, *held*, reversed and remanded. If the state legislature authorizes eminent domain proceedings that are rationally related to a legitimate public purpose, the public use clause of the fifth amendment does not prohibit a taking with just compensation. *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984).

The law of eminent domain evolved from theories of natural law and state sovereignty[9] and was expressed in terms of a compensated taking either for extreme necessity or for public utility.[10] While natural

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amendment provides in part that "[n]o person shall . . . be deprived of . . . property, without due process of law . . . nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Hawaii Constitution has two similar provisions. *See* HAWAII CONST. art. I, §§ 4, 18 (due process and eminent domain provisions). The fifth amendment to the United States Constitution was made binding on the states by the fourteenth amendment's due process clause. *See* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 236-37 (1897) (due process under fourteenth amendment violated if property taken for public use without compensation). The plaintiffs in *Midkiff* contended that a public purpose did not exist if the property was taken for resale to residential lessees. *Midkiff*, 483 F. Supp. at 65.

[6] Midkiff v. Tom, 483 F. Supp. 62, 70 (D. Hawaii 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983), *rev'd sub nom.* Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984). The defendants were the Hawaii Housing Authority, its executive director and commissioners, and the lessee intervenors. *Id.* at 62. The district court announced that the Act was constitutional if the purpose of its enactment was to further the "health, safety, morals, or general welfare of the people of Hawaii," and if rational means were utilized to effectuate that purpose. *Id.* at 67. The court focused its inquiry on whether the legislature acted arbitrarily in adopting the Act. Concluding that the statute's purpose was within the state's police power, the court held the Act constitutional. *Id.* at 70.

[7] Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983), *rev'd sub nom.* Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984).

[8] *Id.* The court concluded that the Act was an unconstitutional attempt by the state legislature to deprive one individual of private property and to transfer it to another individual for his private use and enjoyment. *Id.* The Ninth Circuit remanded for further proceedings in accordance with its opinion. *Id.* On remand from the court of appeals, the district court declared the statute unconstitutional but refused to issue injunctive relief in favor of the landowners. The court of appeals recalled and revised its mandate to include injunctive relief, thereby protecting the res judicata effect of its judgment. Midkiff v. Tom, 725 F.2d at 502-04 (9th Cir.), *rev'd sub nom.* Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321 (1984).

[9] 1 P. NICHOLS, NICHOLS' THE LAW OF EMINENT DOMAIN § 1.14 (J. Sackman rev. 3d ed. 1984).

[10] *Id.*; *see* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requim*, 58 YALE L.J. 599, 600-01 (1949) (public utility natural law justification for emi-

law theorists premised their perception of the power of eminent domain upon recognition of the superior right of the state over private property,[11] advocates of the sovereignty concept recognized the power as an inherent power of the state[12] which was absolute and unlimited.[13] In an effort to define the states' power of eminent domain, the federal government and several state governments imposed constitutional limitations that required a "public use" and "just compensation" for the taking of property.[14]

One of the earliest cases in which the United States Supreme Court recognized the United States government's power of eminent domain was *Kohl v. United States*.[15] Congress had given to the Secretary of the Treasury authority to obtain either by purchase at private sale or by condemnation a site in Cincinnati, Ohio, suitable for the erection of a post office and other public buildings.[16] The plaintiffs in error[17] contended that in the exercise of its power of eminent domain, the federal government must operate as the agent of the state, acting only with the consent of the state and in the manner the state prescribes.[18] The Court concluded that the power of eminent domain was a power

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nent domain).

[11] 1 P. NICHOLS, *supra* note 9, § 1.14[1].

[12] *See* Adirondack Ry. v. New York, 176 U.S. 335, 346-47 (1900) (government's power of eminent domain is inherent); Wellington, Petitioners, 16 Pick. 87, 26 Am. Dec. 631, 640 (Mass. 1834) (same); Brown v. Beatty, 34 Miss. 227, 239 (1857) (right of eminent domain is inherent power of state).

[13] Note, *Real Property — Eminent Domain — Expansion of the Public Use Doctrine to Include the Alleviation of Unemployment and Revitalization of the Economic Base of a Community*, 28 WAYNE L. REV. 1975, 1977-78 (1982). *But see* United States v. Jones, 109 U.S. 513, 518 (1883) (fifth amendment to Constitution and state constitution provisions for taking property with just compensation are limitations only to exercise of eminent domain power); Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878) (provision in state constitutions requiring just compensation for property taken is limitation upon use of power).

[14] *See, e.g.*, MISS. CONST. art. III, § 17; N.J. CONST. art. I, § 20; VA. CONST. art. I, § 11. *See generally* 2A P. NICHOLS, *supra* note 9, §§ 7.13-.14 (limitations at federal and state levels prohibit taking for just compensation without public purpose); Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978) (public use and just compensation provisions did not expressly prohibit takings for private purpose, but courts have construed them as stating such).

[15] 91 U.S. 367 (1875).

[16] *Id.* at 374. The acquisition was authorized by three acts of Congress: Act of Mar. 2, 1872, 17 Stat. 39; Act of June 10, 1872, 17 Stat. 352; and Act of Mar. 3, 1873, 17 Stat. 523.

[17] Plaintiffs in error were lessees of the land subject to eminent domain proceedings, appealing on grounds of lack of jurisdiction. *Kohl*, 91 U.S. at 368.

[18] *Id.* at 369.

"essential to [the government's] independent existence and perpetuity"[19] and that consent of a state was not necessary for exercise of the power.[20]

The Supreme Court in *Fallbrook Irrigation District v. Bradley*[21] considered the constitutionality of a California act[22] which allowed irrigation districts, set up as corporations, to condemn private property over which water would be carried to members of the district.[23] Appellee landowner argued that the statute violated the fourteenth amendment of the Constitution.[24] Appellee claimed she was deprived of her property without due process of law because it was taken for a nonpublic use.[25] In rejecting this argument, the Court noted that a public use was to be determined from the facts and circumstances in each case.[26]

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[19] *Id.* at 371. The Court reasoned that a government cannot exist if it cannot acquire property needed to accomplish governmental objectives. The Court noted that the lands are used for the erection of forts, armories, arsenals, post offices, and courthouses, all of which provide benefits and services to the public. Thus, when power was given to the federal government by the Constitution to establish post offices and courts, authority was also given to acquire sites for such uses. *Id.* at 371-72; *see also* United States v. Carmack, 329 U.S. 230, 236 (1946) (where need of land for public use was within federal sovereign powers, government had condemnation right). *See generally* Marquis, *Constitutional and Statutory Authority to Condemn*, 43 IOWA L. REV. 170, 173-82 (1958) (power of eminent domain extends to constitutionally authorized federal programs). This right of eminent domain is implied in the fifth amendment of the Constitution. *Kohl*, 91 U.S. at 372; *see supra* note 5.

[20] *Kohl*, 91 U.S. at 373-74.

[21] 164 U.S. 112 (1896).

[22] Wright Act, 1887 Cal. Stat. 29 (amended 1889, 1891).

[23] *Bradley*, 164 U.S. at 114, 123. The act included a provision which allowed an assessment of money against the residents of the irrigation district to be used for paying the expenses of organizing the district. *Id.* at 120-21. Bradley, who owned land within the irrigation district, refused to pay the assessment. The collector for the corporation enforced collection by selling Bradley's land to the irrigation district. *Id.* at 122.

[24] *Id.* at 156. U.S. CONST. amend. XIV, § 1 provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Court noted that the fifth amendment public use requirement had been consistently applied only to the federal government. The fourteenth amendment had no provision that pertained to the taking of private property. *Bradley*, 164 U.S. at 158. The Supreme Court in Missouri Pacific Ry. v. Nebraska, 164 U.S. 403, 417 (1896), shortly after deciding *Bradley*, stated for the first time that state condemnation of private property for private use was a violation of the due process clause of the fourteenth amendment.

[25] *Bradley*, 164 U.S. at 154. Appellee contended that enforcement of the act would result in taking property owned by certain people for the benefit of only a few specific landowners and therefore was not a public use. Furthermore, it was contended that the act provided no opportunity for a hearing on the issue of whether persons in appellee's position could benefit from the irrigation. *Id.* at 156.

[26] *Id.* at 159-60. Case law prior to *Bradley* established two differing views of the

The Court also stated that the state legislature and state courts were in the best position to know these facts and circumstances, and therefore their decisions should be afforded respect.[27] Furthermore, the Court held that an entire community need not benefit directly from a taking for such a taking to constitute a public use.[28]

In the beginning of the twentieth century, some courts following

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meaning of "public use." Courts applying the broad view, known as the public benefit theory, interpreted "public use" to mean advantage or benefit to the public. Adherents to the narrow view, however, more literally interpreted the phrase to mean that the public had to actually use or have the right to use the condemned property. 2A P. NICHOLS, *supra* note 9, § 7.02 [1] - [2]; *see, e.g.*, Jones v. Portland, 245 U.S. 217, 224 (1917) (following broad view); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1915) (same); Shasta Power Co. v. Walker, 149 F. 568, 571 (1906) (following narrow view); Gravelly Ford Co. v. Pope & Talbot Land Co., 36 Cal. App. 556, 178 P. 150, 153 (1918) (same). *See generally* Comment, *Eminent Domain: Private Corporations and the Public Use Limitation*, 11 U. BALT. L. REV. 310, 312-14 (1982).

The Court in Clark v. Nash, 198 U.S. 361, 370 (1905), upheld a state statute which allowed a party to condemn the private property of another so that the condemnor could irrigate his land. Reiterating its stance in *Bradley*, the Court noted that the "validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private." *Id.* at 368. One year later in Strickley v. Highland Bay Gold Mining Co., 200 U.S. 527, 531 (1906), the Court interpreted *Clark* to mean that in certain unusual situations the interests of the private individual must bow to the needs of the public welfare. The Court stated that nothing in the Constitution prohibited a state from demanding such concessions from individuals. *Id.* For a discussion of the public use requirement in the early part of the twentieth century, see generally Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615, 621-22 (1940).

[27] *Bradley*, 164 U.S. at 160; *see* Rindge Co. v. County of Los Angeles, 262 U.S. 700, 706 (1923) (Supreme Court gave great respect to state court's interpretation of public use); United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896) (legislature's interpretation of public use afforded respect by courts unless use based on unreasonable foundation); *see also* German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 417 (1914) (Court respected legislative judgment that public interest existed in certain businesses); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 252 (1905) (exclusive right of state to determine public purpose for which property may be taken). *But see* Chicago, St. P. & O. Ry. v. Holmberg, 282 U.S. 162, 167 (1930) (Court not bound by state determination of public use).

[28] *Bradley*, 164 U.S. at 161. The Court concluded that although only the landowners would have actual use of the water, irrigation of millions of acres of otherwise arid land would in fact be of public interest. *Id.* at 161-62; *cf.* Tanner v. Treasury Tunnel, Mining & Reduction Co., 35 Colo. 593, 83 P. 464, 466 (1906) (condemnation constitutional although benefit limited to few landowners); Jacobs v. Clearwater Supply Co., 220 Pa. 388, 69 A. 870, 872 (1908) (number of persons to benefit from condemnation not test for public use).

the "public benefit" theory[29] reasoned that such a theory was in accordance with public policy, was more conducive to individual progress, and was essential for public advancement.[30] These courts held that where a proper governmental purpose existed, private property could be condemned and then sold or leased to private interests.[31] In *Brown v. United States*,[32] a federal statute granted the United States the authority to establish a reservoir which would result in the flooding of a town.[33] Pursuant to the statute, the government condemned private property adjacent to the old town location so the town could be moved to that site.[34] The landowners contended that the government's power of eminent domain did not include the power to take a person's private property and give it to another person.[35] The Supreme Court held that the taking was for a public use[36] and that the condemnation of private

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[29] *See supra* note 26.

[30] *See* Nash v. Clark, 27 Utah 158, 75 P. 371, 373 (1904), *aff'd*, 198 U.S. 361 (1905).

[31] *See e.g.*, County of Madera v. Raymond Granite Co., 139 Cal. 128, 72 P. 915, 918 (1903) (court upheld statute permitting condemnation of land for private road); Marchant v. Mayor of Baltimore, 146 Md. 513, 126 A. 884, 887 (1924) (court upheld condemnation of land for building harbor to be leased to private individuals and corporations). *See generally* Comment, *supra* note 26, at 314-18 (discussing examples of condemnations benefitting private individuals).

[32] 263 U.S. 78 (1923).

[33] *Id.* at 80-81; *see* Sundry Civil Act of Mar. 4, 1921, ch. 161, 41 Stat. 1367, 1403.

[34] *Brown*, 263 U.S. at 80-81. The reservoir was constructed to irrigate arid public lands by damming the waters of the river. Three quarters of the town would have been flooded as a result of the government's construction of the reservoir. In addition to the construction, maintenance, and operation of the American Falls Reservoir, the government was authorized to condemn and improve suitable land for the relocation of the town, provide removal of buildings to the new site, and appraise the lots at the new town site to accurately compensate for the property flooded by the reservoir. *Id.* at 80.

[35] *Id. But see* Gould Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365, 369-70 (1954) (power of eminent domain included taking property from one person and selling or leasing it to another to prevent reoccurrence of slum conditions); Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575, 578-79 (1972) (private property taken from one person and leased to private enterprise for urban renewal constituted public use).

[36] *Brown*, 263 U.S. at 80. The Court reasoned that a public use existed since three-fourths of the town had to be relocated, and the tract of land taken was the only practicable and available place to which the town could be moved. The determination of what constitutes a public use has been essentially a local question influenced by various considerations particular to a jurisdiction. 2A P. NICHOLS, *supra* note 9, § 7.05; *see* W. S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 261 (10th Cir. 1967) (irrigation important to existence and functioning of state and to livelihood of people); Horne v. Pearl River Valley Water Supply Dist., 249 Miss. 358, 367, 162 So. 2d 504, 507 (1964) (multipurpose project for pollution control, control of access, and recreational purposes considered public benefit); Dalles Lumbering Co. v. Urquhart, 16 Or. 71, 19 P. 78, 80 (1888) (canal built

property for removal of the town was necessary to enable the government to perform a public service.[37]

United States ex rel. Tennessee Valley Authority v. Welch[38] represented the continued trend of liberality in interpreting public use.[39] In *Welch*, Congress had authorized the construction of a dam by the Tennessee Valley Authority (TVA) to provide power for production of war-time equipment.[40] Construction resulted in the creation of a reservoir which flooded the only road to a privately owned area of land.[41] Rather than construct a new road, the TVA elected to acquire the affected land.[42] The Supreme Court upheld the constitutionality of the acquisition concluding that the taking was for a public use.[43] The Court viewed the condemnation of the land as an "integrated effort" by the TVA to perform functions authorized by Congress.[44] The Court stated that only Congress had the power to decide what type of taking constituted a public use,[45] and that the Court would defer to such a

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by private corporation was public benefit because public had interest in cheap delivery of forest products); Highland Bay Gold Mining Co. v. Strickley, 28 Utah 215, 78 P. 296, 298 (1904) (mining furnished employment, fuel products, and wealth which were necessary for public welfare).

[37] *Brown*, 263 U.S. at 84.

[38] 327 U.S. 546 (1945).

[39] *See generally* J. GELIN & D. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN § 1.3 (1982) (historical discussion of courts' treatment of public use).

[40] *Welch*, 327 U.S. at 548. Congress, through the Tennessee Valley Authority Act, empowered the TVA to build Fontana Dam on the Little Tennessee River in North Carolina. *Id.; see* Tennessee Valley Authority Act, ch. 32, 48 Stat. 58 (1933) (codified as amended at 16 U.S.C. § 831 (1977)).

[41] *Welch*, 327 U.S. at 548.

[42] *Id.* at 549-50. The Court found that the replacement cost of the road would be approximately $1,400,000, and the expense of an improved highway would be even greater. The Court further found that such cost was not justifiable since the highway serviced only a few people. *Id.* The Court held that the cost of a public project is a relevant factor to consider and the government must not ignore the elements of cost. *Id.; see also* MISS. CODE ANN. § 65-5-9 (1972) (statute which is essentially economically oriented and provides for condemnation of entire tract when only part is needed if best interests of public are served by eliminating costs).

[43] *Welch*, 327 U.S. at 552.

[44] *Id.* at 553. The responsibilities of the TVA, authorized by congressional enactment, included those acts relating to "navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley," and acts necessary for the "readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas [when effectuating] the purposes of the Act." The TVA's actions were to be for the "purpose of fostering an orderly and proper physical, economic, and social development" of the Tennessee River basin. *Id.; see* Tennessee Valley Authority Act, 16 U.S.C. § 831(c) (1977).

[45] *Welch*, 327 U.S. at 551-52. *But see* Horne v. Pearl River Valley Water Supply

congressional decision unless an impossibility was shown.[46] The Court further determined that Congress had granted the TVA all the power necessary to condemn land essential to the purposes of the project,[47] and that since the TVA had acted in accordance with congressional policy, the taking was constitutional.[48] The "public use" requirement was also at issue in *People of Puerto Rico v. Eastern Sugar Associates*,[49] when the Puerto Rican government condemned land owned by Eastern Sugar pursuant to a legislative program designed for agrarian reform.[50] The corporate landowner argued that it was being denied due process because the land was being taken from it and sold or leased to others for their personal use.[51] The United States Court of Appeals for the First Circuit rejected this argument and found that the reform legislation served a valid public purpose and its enactment was within the legislature's power.[52] Determination of whether the proposed uses for

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Dist., 249 Miss. 358, 365-66, 162 So. 2d 504, 506 (1964) (determination of public use is judicial question; determination of public necessity is legislative question); MISS. CONST. art. III, § 17 (public use shall be judicial question and shall be determined without regard to legislature's assertion that use is public).

[46] *Welch*, 327 U.S. at 552. The Court reasoned that if judicial restraint were not exercised, then courts would be substituting their judgment for Congress'. *Id.; see* Conahan, *Hawaii's Land Reform Act: Is it Constitutional?*, VI HAWAII B.J. 31, 37 (1969) (*Welch* strongly indicated Court would not likely overturn legislative determination of public use); *see also* Comment, *supra* note 10, at 614 (Court repudiated public use doctrine in *Welch*). *Compare* Culley v. Pearl River Indus. Comm'n, 234 Miss. 788, 821, 108 So. 2d 390, 403 (1959) (court will not interfere unless public necessity results from fraud or abuse of discretion) *with* MISS. CONST. art. III, § 17 (public use shall be judicial question and shall be determined without regard to legislature's assertion that use is public).

[47] *Welch*, 327 U.S. at 554.

[48] *Id.* at 552, 554. For a general discussion of *Welch*, see Note, *Eminent Domain — What is a Necessary Public Use — Saving to Government as Primary Motivating Factor*, 20 S. CAL. L. REV. 99 (1946).

[49] 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946).

[50] *Eastern Sugar Assocs.*, 156 F.2d at 318-19, 321. The program was designed to end corporate ownership of large estates of land and to place ownership of the property in the individual inhabitants for the economic well-being of the area. *Id.* at 318. Disposal of condemned land was authorized for three purposes: (1) distribution of land to squatters for their homes; (2) distribution and operation of land to individual farmers for subsistence farms; and (3) establishment of "proportional profit" farms. *Id.* at 319. A fourth potential use facilitated the revitalization of the sugar and liquor industries. *Id.*

[51] *Id.* at 323. Because Puerto Rico is a territory of the United States rather than a state, the fourteenth amendment to the United States Constitution was not directly applicable. The court relied instead upon the fifth amendment, although the rationale of fourteenth amendment due process decisions regarding the validity of condemnation proceedings was appropriate. *Id.* at 322.

[52] *Id.* at 324. The district court stated that the state's power of eminent domain does not necessarily have to be grounded upon the proposition that the taking was neces-

the land were wise, expedient, or necessary was held to be a legislative function.[53]

This deferential approach to issues of public use was expanded by the Supreme Court in *Berman v. Parker*.[54] In *Berman*, the Court minimized the role of the judiciary in determining the validity of the public purpose on which an eminent domain proceeding was based.[55] The Court upheld the condemnation of all property in a slum neighborhood under a comprehensive redevelopment project[56] notwithstanding the fact that private parties would individually benefit from the taking and redevelopment.[57] The Court further found that the public purposes which justified the condemnation could be accomplished by methods

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sary for the public health, but may be "exercised if the taking is essential or material for the prosperity of the community." *Id.* (quoting Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 163 (1896)).

[53] *Eastern Sugar Assocs.*, 156 F.2d at 523. The court noted that legislatures had wide discretion in determining public use. *Id.* Because of its "intimate knowledge of local conditions," the conclusions of a legislature deserved respect from the judiciary. *Id.* at 324. The court concluded that its sole function was to decide whether the legislative authorization of condemnation was based on a belief that evils existed which required remedial measures and whether the means adopted were reasonably directed toward eradication of the evils. *Id.*

[54] 348 U.S. 26 (1954).

[55] *Id.* at 32; *see also* Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (congressional declaration of public purpose entitled to deference by judiciary); *supra* note 27 and accompanying text.

[56] *Berman*, 348 U.S. at 34-35; *see* District of Columbia Redevelopment Act of 1945, D.C. CODE ANN. §§ 5-701, -719 (1951). Congress had determined that blighted areas of Washington, D.C., were injurious to the public health, safety, morals, and welfare, and could be overcome only by acquisition and redistribution of the property. *Berman*, 348 U.S. at 28-30. Appellant landowner challenged the taking of his business property on the basis that it was not slum housing and, therefore, should not have been included in the redevelopment scheme. *Id.* at 31. The Planning Commission, an agency authorized by the statute determined, however, that the needs of the community could be successfully met only by implementation of a comprehensive plan for the entire area rather than by a piecemeal approach. *Id.* at 34. Other courts have also held that slum clearance is a public use and have allowed condemnation of nonslum areas as a part of a general urban renewal plan. *See e.g.*, Herzinger v. Mayor of Baltimore, 203 Md. 49, 98 A.2d 87, 94 (1953) (test was area as unit, not property owner's individual building); Velishka v. City of Nashua, 99 N.H. 161, 106 A.2d 571, 575 (1954) (not necessary that every building in condemned area be in blighted condition); *see also* Paulk v. Housing Auth. of Tupelo, 195 So. 2d 488, 491 (Miss. 1967) (condemnation of vacant land free of slum or blighted conditions upheld).

[57] *Berman*, 348 U.S. at 33-34. The redevelopment act gave preference to private agencies in carrying out the redevelopment project. *Id.* at 30. Appellants contended that this preference made the project "a taking from one businessman for the benefit of another businessman," and not a taking for public use. *Id.* at 33.

other than public ownership.[58] Because Congress had determined that a public purpose justified the project and had chosen what it deemed the best means to achieve the purpose, the Court held that the fifth amendment limitation of taking for a public purpose with just compensation was satisfied.[59] Incidental benefits to individuals did not negate the public purpose of the taking.[60]

In the instant case, the Supreme Court reasoned that since the regulation of land oligopolies was a reasonable exercise of state police power,[61] then the Land Reform Act of 1967 was a valid attempt at policing the socioeconomic evils inherent in Hawaii's land oligopolies.[62]

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[58] *Id.* at 34. The primary issue concerned the legitimacy of the purpose rather than the public nature of the purpose. It has been suggested that *Berman* makes clear that if a purpose is within the government's power, eminent domain may be used to achieve the purpose, and that the courts have retained the public use requirement to examine the legitimacy of the purpose. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1, 42-43 (1980).

[59] *Berman*, 348 U.S. at 34-36. According to one writer, some courts have interpreted *Berman* incorrectly as authority for noncompensatory regulation to achieve aesthetic goals, disregarding the costs suffered by private owners. *See* Costonis, *"Fair" Compensation and the Accomodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1037 (1975). These courts have confused the distinction between the police power and the power of eminent domain in the overall scheme of governmental regulation. *Id.* at 1036-37.

[60] *Berman*, 348 U.S. at 33-34. In Poletown Neighborhood Council v. City of Detroit, 410 Mich. 894, 304 N.W.2d 455, 459 (1981), the public purpose determined by the legislature was found to be legitimate even though private interests benefitted from the condemnation. The Michigan legislature had authorized the condemnation of private property by a municipality to provide industrial sites in an effort to revitalize the economic base of the city. The condemned property was ultimately transferred to a private manufacturer. The court, however, found this benefit incidental to the benefit the public would receive through alleviation of unemployment in the city. *Poletown Neighborhood Council*, 304 N.W.2d at 458-59; *see also* Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 18, 156 So. 2d 572, 577 (1963) (taking not invalid "merely because an incidental benefit will inure to private individuals"), *cert. denied*, 376 U.S. 70 (1964).

[61] *Midkiff*, 104 S. Ct. at 2330. The Court found that the public use requirement of the fifth and fourteenth amendments was coterminous with a state's police power. *Id.* at 2329. The Court noted that although judicial review of legislative determinations is proper in eminent domain-police power situations, courts should show great deference to legislative findings of public use unless it is impossible to categorize the taking as one for public use. *Id.*

[62] *Id.* at 2330. The Hawaii legislature had found that land oligopolies compelled many homeowners to lease the land on which their homes were situated. The Court noted that the Act was designed to alleviate the land oligopolies' harmful effects on the residential marketplace. When a sufficient number of qualified homeowners were willing to purchase residential lots at fair prices but were unable to because of the oligopolies, the Act authorized the condemnation and sale of the lots. *Id.; see supra* note 4 and accompanying text.

The Court concluded that since the Hawaiian legislative purpose in breaking up the oligopolies was legitimate[63] and since the state's exercise of its eminent domain power was rationally related to this legislative purpose,[64] then the Hawaii Land Reform Act was constitutional.[65]

The Court's decision in the instant case represents an increasingly liberal view by the Supreme Court of what constitutes a public use. This view began with *Welch*,[66] continued in *Berman*,[67] and is expanded in the instant case.[68] The Court leaves the determination of public use to the legislatures of the individual states and thereby grants to them an almost unlimited power to condemn private property.[69] The Court decreases so significantly the protection provided to individuals by the fifth amendment that the public use clause no longer represents a safeguard against a governmental taking. The result may be that the right of private ownership of land is no longer secure. The legislatures are granted the power to take any private property as long as the taking is for a conceivably public purpose. The requirement of an actual "public use" to implement eminent domain proceedings has been eliminated. To restore substance to the fifth amendment public use clause, the Court should adopt a narrow, objective view of that clause. The requirement of an actual public use would provide the constitutional protection intended for the private individual and his property rights.

Bill Stennett

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[63] *Id.* at 2330. In emphasizing that the findings of the state and the federal legislatures are to be accorded great deference in the areas of social and economic legislation, *id.* at 2330-31, the Court concluded that that Hawaii legislature had a legitimate public purpose in correcting residential market deficiencies caused by the land oligopolies. *Id.* at 2330.

[64] *Id.* The Court pointed out that the public use requirement did not demand that the government actually use the land. *Id.* at 2331. Rather, the public use clause was more concerned with the purpose of the taking. Furthermore, the condemned property need not actually be used for the benefit of the general public so long as a public purpose is served by the taking. *Id.* The Court also stated that "[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." *Id.*

[65] *Id.* at 2331-32.

[66] *See supra* notes 38-48 and accompanying text.

[67] *See supra* notes 54-60 and accompanying text.

[68] *See supra* notes 61-65 and accompanying text.

[69] *See supra* notes 27, 55 and accompanying text.

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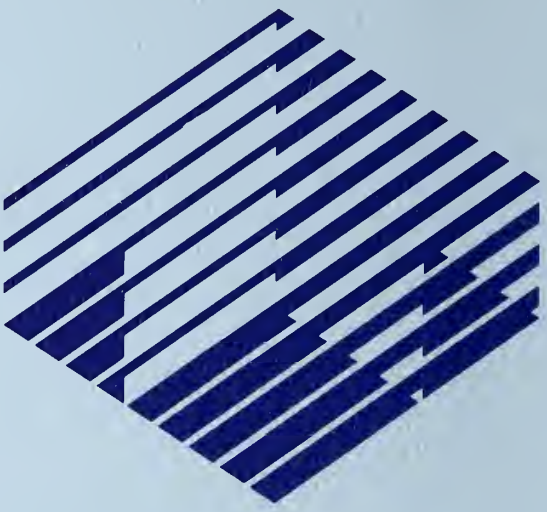

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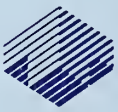

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